III

# THE CONSTITUTIONAL BEGINNINGS OF NORTH CAROLINA

(1663-1729)

JOHNS HOPKINS UNIVERSITY STUDIES

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History is past Politics and Politics present History.—*Freeman*

TWELFTH SERIES

III

# THE CONSTITUTIONAL BEGINNINGS OF NORTH CAROLINA

(1663-1729)

BY JOHN SPENCER BASSETT

*Fellow in History, J. H. U.: Professor Elect of History in Trinity College, North Carolina*

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J. S. B.

*February 20, 1894.*

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# SOURCES OF INFORMATION.

"The Colonial Records of North Carolina," edited by Col. W. L. Saunders; Vols. I., II. and III. This has been our chief source. In its volumes we have found letters of instruction, reports of officers, laws, court records, and various other documents. The nature of the work in hand has rendered it necessary to depend more on these materials than on the several narrative histories of the State, although valuable general knowledge has been gotten from the latter.

"Laws of North Carolina": printed by James Davis, 1752.

"History of North Carolina": F. L. Hawks; 2 vols. (1584-1729). Volume II. of this work deals with the Proprietary period and is without doubt the best treatment of the subject that has appeared.

"Political Annals of the United Colonies": George Chalmers; 1780. This work was based on original authorities, but contains little for us that cannot be found in better shape in the "Colonial Records." Its chapter on Carolina is reprinted in Carroll's "Historical Collection of South Carolina," Vol. II.

On Durham County:

Surtees: "History of the County Palatine of Durham."

Publications of the Surtees Society, particularly Vols. 32, 82, and 84.

We have also consulted in a general way:

Williamson: "History of North Carolina."

Martin: "History of North Carolina."

Winsor: "Narrative and Critical History," Vol. V., in which is reprinted Rivers' sketch of the early history of Carolina.

Doyle: "English Colonies in America."

John Lawson: "Exact Description of the Natural History of North Carolina," 1709.

Brickell: "Natural History of North Carolina," 1737.

Weeks: "The Religious Development of North Carolina," J. H. Univ. Hist. Studies, Tenth Series.

Howard: "Local Constitutional History of the U. S."

MacMahon: "History of Maryland."

Other works have been used for specific purposes. These are indicated in footnotes, which, it is hoped, will be found as ample as is desirable.

## CHAPTER I.

### INTRODUCTION.

The Proprietary government of North Carolina began in 1663, with the royal grant, and ceased in 1729, with the sale of the entire property to the Crown. The eight noblemen who, by the royal favor, were constituted its "true and absolute lords and proprietors," proceeded in 1665 to outline the plan by which they proposed to administer the civil affairs of their property.[1] Their design was to create for the time certain distinct governments, each directly dependent on the Proprietors. These they designated "counties." Three counties were actually organized. They were: (1) Albemarle, a region north of Albemarle Sound, and containing 1600 square miles; (2) Clarendon, the district to the south of the mouth of the Cape Fear; and (3) Craven, the territory immediately south of Cape Romaine.[2] Over each county was placed a Governor, with the necessary administrative associates.

With Craven and Clarendon counties we have here nothing to do; for the one lay wholly without the region that later became North Carolina, and the other, though within that territory, was soon abandoned, that its inhabitants might unite with those of Craven county to build up the more prosperous colony of South Carolina.

Our inquiry lies particularly with Albemarle county. This government, though at first the smallest of the three, gradually extended its authority over the neighboring districts, until at the end of the seventeenth century it became known as North Carolina, and embraced all that part of the province that lies north and east of Cape Fear. The original county was divided into precincts, and, along with other counties

[1] Col. Records of North Carolina, I., 79. [2] *Ibid.*, I., 93.

that were subsequently created on the same plan, continued to exist till 1738, when the larger division was abolished, and in its place the old precinct, which was now known as a county, became the regular local administrative and judicial unit.[1]

In 1691 the Proprietors seem to have thought that their progress in planting colonies was sufficient to warrant a union of the several settlements into one government. They accordingly appointed for the whole colony one Governor, known as the Governor of Carolina, who, with one Council and one Assembly, was to direct the government of all Carolina.[2]

This was, doubtless, a previously arranged plan for gradually bringing into use the Fundamental Constitutions. It certainly took a step toward the general provisions of that instrument. The only practical result was the division of the province into North and South Carolina. Whatever irregularly defined counties might have existed before this, they were now integrated, not into one, but into two, governments.[3] It was the large tract of unsettled country lying between Charleston and Albemarle Sound that caused this division. On second thought, the Proprietors agreed that if Albemarle found it inconvenient to send delegates to the Assembly at Charleston, the Governor might establish in the northern county a separate government, with such powers as he saw fit to confer.[4] Thus a Deputy Governor, appointed by, and reporting to, the Governor of Carolina became the head of the government in Albemarle.

This state of affairs continued from 1691 to 1710. There being no direct communication between the North Carolina

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[1] Williamson: Hist. of N. C., I., 163; also Laws of 1752, pp. 86, 90.

[2] Col. Recs. of N. C., I., 373-380.

[3] The Proprietors claimed that there were four counties: Albemarle, Craven, Berkeley, and Colleton. Only Albemarle was in North Carolina, and in South Carolina only Craven had been definitely organized. See Col. Recs. of N. C., I., 377.

[4] See Col. Recs., I., 380-1. Chalmers says, rather disparagingly, that North Carolina "refused to join in legislation with their southern neighbors." Chalmers: Hist. of the Revolt, I., 398.

authorities and the Proprietors, we have but scant records for the period. One result is observable, however. The people, left largely to themselves, gained a greater influence in the government. The popular influence began to overmaster the Proprietary interest, and the colony became for a short time peaceful and happy.

In 1710 the Proprietors resolved that "a Governor be made for North Carolina independent of the Governor of South Carolina."[1] This action is in danger of being spoken of as the separation of North and South Carolina; but there was never any organic union between the two colonies. When the Governor of Carolina was instructed to appoint a Deputy Governor for North Carolina he was directed to appoint a similar officer for the southern colony. These two were therefore entirely co-ordinate in authority. From the fact that the Governor of Carolina usually appointed his deputy for North Carolina and lived in more populous and more cultured South Carolina, which he often ruled in person, the idea has sometimes appeared that the Governor of the northern colony was dependent, not on the Governor of Carolina, but on the Governor of South Carolina.

From 1712, the time of the settling of affairs under the revived independent Governor, the colony remained prosperous and peaceful. The Lords relaxed their design of making a constitution for the people and allowed them practically to devise their own laws. That faction of the inhabitants which favored the Proprietors managed to hold the Assembly, and by a wise use of their power brought about

[1] There is something unexplained about this event. Our quotation is taken from the minutes of a meeting of the Proprietors (Col. Recs., I., 750). This occurred Dec. 7, 1710. Eight days later the Governor of Virginia addresses Hyde as Governor (*Ib.*, I., 750). Hyde must have been recognized in the colony before he was appointed by the Lords (cf. Hawks, II., 517). Hyde seems to have depended on a commission from Tynte, the Governor of Carolina, who dying at this time, the new Governor was obliged to have a commission from the Proprietors, which was issued, Jan. 24, 1712 (Col. Recs., I., 841). Hawks adopts the latter date as the beginning of Hyde's term (Hist. of N. C., II., 493).

some good laws and, until just before the close of the Proprietary period, much good feeling.

With regard to the development of civil liberty, the results of our investigation fall into three stages. These are: (1) the period of infancy, (2) the period of physical struggle, and (3) the period of constitutional reform.

The period of infancy is only important as giving a starting-point. It was co-existent with the system of government organized under the Concessions of 1665,[1] and was superseded in 1670 by those constitutions which were temporarily to take the place of the Fundamental Constitutions. In the minds of the Proprietors the Concessions themselves were doubtless intended to be temporary, but there is no evidence that any such intentions were communicated to the settlers. The leading characteristic of the period is the tutelar nature of government. The Proprietary influence was at its height, and from this state of freedom, or non-freedom, the growth of civil liberty began.[2]

The second period, however, is of more importance. All States in which liberty has proceeded by any regular growth from authority to equality have begun the process with a period of physical struggle. North Carolina was no exception to this rule. From 1670 to 1712 her people, according to Colonel Saunders, drove from office six of their fourteen Governors.[3] During this time there were two actual rebellions, and the inhabitants were kept in a constant state of unrest. Governor Spotswood, of Virginia, remarked, rather spitefully, that the people were so used to turning out their Governors that they thought they had a right to do so.[4]

The first of these troubles, the "Culpeper Rebellion," came soon after the arrival of the Fundamental Constitutions,

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[1] Col. Recs., I., 79.

[2] The Proprietors' government was definitely established in Albemarle in 1664, about three months before the Concessions. Before this there had been a few people there, mostly Virginians, who held their lands from the Virginia government or from the Indians.

[3] Col. Recs., II., p. x.

[4] *Ibid.*, II., p. x.

and it has, therefore, been customary to say that the troubles of the period arose from an attempt to enforce that system. This appears not to be true, and for two reasons: (1) The Proprietors did not attempt to enforce the Constitutions as such in North Carolina; and (2) whenever there is trouble there is always assigned a sufficient cause—and a cause which has nothing to do with the Constitutions. Not one fact, but several facts, caused the various struggles of the people against their rulers. The three most marked grievances were the attempt to enforce the navigation laws, the scheme to introduce the established church, and dishonest or inefficient Governors. To this should, perhaps, be added a certain amount of demagoguery, an element which is always plentiful where an oppressed people are ignorant and for a considerable part of their time unemployed.

The excesses of this period brought the colony the reputation of being lawless. This imputation is more easily justifid than denied. The people had real grievances. Unused to the formalities of law, and, under the Proprietors' system of government, having but little opportunity for a legal redress of grievances, they struck for relief by what seemed to them the nearest and surest method—by physical force. While it cannot be denied that their resistance largely influenced the liberal settlement of the government in the Revisal of 1715, still it must be admitted that relief would have come sooner and with less discredit to the fame of the province had the difference been fought out in a constitutional manner.

The third period may be said to have begun with the settlement of internal affairs after the "Carey Rebellion"—say about the end of 1711. It ended, so far as this work is concerned, in 1729. It was a period of constitutional struggle. The marked improvement on the former period was brought about by a union of two causes. First, the people had come to see the futility of employing force. They observed that such tactics had but put their opponents into office and had weakened the colony against Indians. Secondly, the Pro-

prietors on their part came to adopt a more liberal policy towards the settlers. They allowed the code of 1715 to take the place of the shadowy and indefinite system of 1670 which they had vaguely embodied in their instructions to successive Governors. Thus they themselves were largely removed from the administration of affairs, and their Governors, especially Eden, seem to have been inclined to get along with the people as easily as possible.

As a consequence, all struggle ceased for more than a decade, and when it did re-appear amid the confusion of the closing days of the Proprietary regime, it was methodical and constitutional. The Assembly's calm but firm manner of asserting its rights at this period suggests all the dignity of the English Parliamentary battles of the seventeenth century. The struggle thus begun was carried over to the period of the royal province, and was not finally allayed till North Carolina became a State.

There is one fact in the early history of North Carolina that makes it unique among all the Southern colonies. That fact lies in the economic conditions of the early settlement. Two forces tended to keep it a poor colony, thus giving a turn to its later character. In the first place, it was the policy of the Proprietors to grant the land in small holdings, six hundred and forty acres being usually the maximum quantity. Only a few persons, the hereditary nobility for the most part,—and in North Carolina these were rare indeed,—could acquire larger continuous tracts.[1] By this means land-

[1] As early as 1669 the Assembly passed a law which for five years restricted land-holdings to 660 acres. This law did not extend to Proprietors. Landgraves and Caciques. It was made to prevent dispersion of the inhabitants over a very large area. (See Col. Recs., I., 186.) The amount a man might then take up without purchase was 60 acres for himself and 50 or 60 acres for each person he brought in with him. Later it was 50 acres, without distinction, for each person that came in. One must therefore be a considerable man to secure at any time more than 1000 acres (*Ib.*, I., 182). In 1709, if not earlier, the Proprietors declared that no more than 640 acres should be sold to one man without their written permission (*Ib.*, I., 706, also I., 846, and II., 457). In 1702 it had been restricted to 500 acres (*Ib.*, I., 556). Brickell says it was 640 acres in 1737 ("Natural Hist. of N. C.," p. 12).

owners were not powerful. In Virginia and in South Carolina, where it was the custom to make large grants, a predominant landed aristocracy soon sprang into existence. Situated in the midst of slaveholding States, North Carolina has not entirely escaped the influence of its environment. It has always been distinctly Southern, but only mildly aristocratic. It has at no time been dominated by a few powerful families.

In the second place, the earliest settlements in the State were in that part where uncertain harbors prevented a direct trade with England. The settlers were thus left to an unprofitable commerce with the older communities in America. No extensive industry became established. The people were isolated, and produced but little more than they could consume. Thus this colony, with perhaps the most fertile soil on the Atlantic coast, lagged behind in material prosperity.

To these two economic facts we must add a fact of a social nature, before our view can be considered complete. North Carolina was often turbulent. Whether it was for good reasons or for bad, there was frequent social disorder within its borders. As has been said, bad administration was to some extent responsible for this, but back of this cause lay the condition of the masses. There was little religious instruction and less education. There was not a printing press in the province.[1] Governor Burrington's statement in 1732, that there was not in the province "a sufficient number of gentlemen fit to be councillors, neither to be Justices of the Peace, nor officers in the militia,"[2] must be understood as a partisan utterance, yet it was not without a color of truth. The Virginians charged repeatedly that North Carolina, by shielding immigrants from prosecution for debts contracted before coming into the colony, became an asylum for the vicious classes, and it cannot be denied that such a law would bring some undesirable citizens into the colony.

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[1] The first printing press was introduced in 1749. Wheeler: Hist. of N. C., I., 112, and Martin: Hist. of N. C., II., 54.

[2] Col. Recs., III., 332-3.

Yet that does not seem sufficient. It is more probable that the economic disadvantages of small estates and of the lack of commerce induced the better class of immigrants, those who possessed means, to go to Virginia or to South Carolina, thus leaving North Carolina for less substantial settlers.

## CHAPTER II.

### The Source of the Constitution of North Carolina.

#### Section 1.—*The King's Idea of a Colony.*

In the private note-book of Henry VII. of England appears this entry: "10th August, 1497. To him that found the new isle, £10." This, it is supposed, refers to John Cabot's discovery of the American continent. If the assumption be correct, it means that the frugal king, at the moderate expense of ten pounds, gained for his private property the entire Atlantic coast from Labrador to Florida.

If to-day a region of unsettled country suddenly became American soil, we should expect it to be received and granted out to settlers in the name of the American people. But in regard to Cabot's discovery an entirely different method was followed. It was a doctrine of the English law that all land not otherwise occupied was the property of the king; that is to say, it was Crown Land, or *terra regis*, as the legal phrase ran. The king could dispose of such land as he saw fit. As a matter of fact, his American possessions were divided into what was afterward known as colonies, and each of these was settled in one of three ways. Thus there came to be proprietary, charter, and royal colonies.

The *proprietary colony* was the method of colonization that first suggested itself to the English sovereign.[1] This meant that some individual or corporation received the lands it was intended to populate, and with them the right to maintain the government over the inhabitants who settled there. The Proprietary took the position of the king in reference to

[1] Gilbert and Raleigh received their patents as proprietaries. Virginia began under such a system of royal interference that the government was neither proprietary nor royal, but within three years went into the hands of a company that was really a proprietary. See Bancroft, Part I., chaps. VI., VII.

the colony. He was responsible to no one except to his sovereign. It is interesting to note that this institution was analogous to the old mark and county palatine, by which early Germanic emperors had held their turbulent frontiers. Similar conditions in the sixteenth and seventeenth centuries suggested a similar method of meeting them.

The *charter colonies* existed in New England. Hither the king allowed a number of Dissenting congregations to come, in order that they might worship God as they chose. These colonies cannot be said to be embraced in the colonizing scheme of the English kings. So far as the monarch was concerned, they existed by sufferance. They had their liberties guaranteed by a royal charter, and were, in many respects, closely analogous to the English towns on the royal domain.

The king held a kind of reversion on both of these kinds of colonies. If it happened that the conditions on which they were then held were violated, the king might sue for and recover possession of them. It did come about that on various pretexts the Crown succeeded in getting the courts to remit into its hands several of the colonies, which were accordingly known as *royal provinces.* It will be noticed that this method was not in favor as a means of planting colonies. There is not one of the English planted colonies in the limit of the present United States in regard to which the king can be considered to have said to himself: "Go to, I will make me a colony." He chose rather to make some other person's colony his own.

Let us ask now: "Whence came the constitutions of these colonies?" Here writers are by no means unanimous. One class holds that our institutions were taken bodily from our English home; another claims that they were a product of the American soil; while still another, taking a middle view, think that they represent a complex process in which selection and growth both appear.

A mistake that has too often been made in this connection —as elsewhere, when writing of American institutions—is to

look at the whole field from the standpoint of the New England colonies. These colonies, left largely to themselves, had ample opportunity to develop their institutions in their own way; and, in truth, their constitutions were more characteristically American, in our present use of the term, than those of any other colonies. Outside of New England the forms of government were, in most cases, sent in the first instance from England. They came from men who, for the most part, had never been in America, and who, in many cases, had purposes in view which were foreign to the purposes of the colonists.

If we are to understand these constitutions we must remember that they were not uniform. Each Proprietor had his own ideas of government. Each may be supposed to have consulted existing models before devising his own system. Wise old William Penn had been doing this when he wrote in the preface to his "Frame of Government": "I do not find a model in the world that time, place, and some singular emergencies have not necessarily altered; nor is it easy to frame a civil government that shall serve all places alike."[1] This idea is also well illustrated in the governments of Maryland and of North Carolina. Here the two royal charters were almost identical, and yet the administration of the provinces differed widely. The differing was due to the personal equation of the two proprietaries.

With such varying factors to be reckoned with, one cannot say in any general way where the American institutions originated. All that a cautious person will say is that after careful research he thinks that the constitution of a given State originated in a certain specified manner.

So far as North Carolina is concerned, it is the opinion of the present writer that its general form of government was modeled after the English manorial organization. Let us explain what we mean by manorial organization. There was in England, until the days of modern reform, two local juris-

[1] Proud: Hist. of Penn., I., p. 197.

dictions. On the one hand was the authority of the king, exerted through the sheriff in the county and through the reeve in the township; on the other hand was the authority of the lord of the manor, exercised either in person or through his steward. The one stood for the people and the people's leader, the king; the other stood for the land and for the land's owner, the lord. The one was expressed tangibly in the jurisdiction of the township and of the county; the other, in the private jurisdiction of the courts baron and leet. Now it is the latter institution that we mean by the manorial organization; that is to say, that system by which the lord of the land was constituted the lord of the civil affairs of those who lived on the land. And of these two institutions it was, we think, the latter that was imitated by the builders of the government of Proprietary North Carolina.

But it was not the simple English manor that was copied. It was, rather, the County Palatine—in point of authority the highest form of the manor. The most patent reason for saying this is a clause in the royal grant itself. By this it was declared that the Proprietors should "have, hold, use, exercise, and enjoy the same [their privileges] as amply, fully, and in as ample manner, as any Bishop of Durham in our kingdom of England ever heretofore had, held, used, or enjoyed, or of right ought, or could, have, use, or enjoy."[1] It was also provided that the property should be held, at an annual rent of twenty marks, "as of our manor of East Greenwich, in Kent, in free and common socage and not in capite, or by knight's service."[2] Furthermore, it will be seen on examination that when the Proprietors organized their property they carried into effect the features of the Palatinate organization. The Fundamental Constitutions, which were not enforced, and the temporary constitution, which was enforced, both strongly suggest the lord of the manor. In either case the Lords were the source of all real power. They appointed their executive agents; their own courts adminis-

[1] Col. Recs., I., 103. [2] *Ibid.*, I., 104.

tered their own justice or preserved the Proprietors' peace; even the Assembly was a kind of court-baron to consider the welfare of the colony. Its laws were enacted by the Lords Proprietors with the advice and consent of the Assembly, but certain restrictions made them practically the will of the Lords.

There is no better way of understanding the County Palatine in America than to examine the same institution in England. To arrive at this we have made an analysis of the constitution of the County Palatine of Durham, which we shall give in our next section.

## Section II.—*The Palatinate Franchise.*[1]

William the Conqueror, in order to prevent the rearing of a powerful landed aristocracy, had recourse to two measures: (1) He took care not to grant to one nobleman large adjacent estates; and (2) he placed the administration of each shire in the hands of the sheriff, one of his own officers. There were, however, three exceptions. On the Scotch and Welsh borders and on the southeast coast, where an army from the Continent would be likely to land, he created large political divisions, and placed one man over each of them. Thus were created the Counties Palatine of Durham, Chester, and Kent. Over the first two, in order that no strong feudal families might be founded, he placed Bishops; but over Kent he thought he might venture to place a layman.[2] Of these counties, Durham was the most powerful; and because there was danger from the north long after the realm was safe from invasion from either west or southeast, Durham

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[1] In preparing this sketch we have used as a basis Robert Surtees's "History of the County of Durham." We have attempted to reproduce the general features of the Palatinate Franchise, and have not sought to fill in the more minute points which are not essential to our purpose, *i. e.*, to a concept of the general appearance of the Palatinate. The publications of the *Surtees Society* have also helped us considerably.

[2] Taswell-Langmead: Const. Hist. of Eng. (4th ed.), pp. 61, 62.

was still mighty at the period of the American colonization. Thus it happened that its franchise served as a model for some of the proprietary colonies in America.

The most striking characteristic of the Palatinate jurisdiction was its independence. The unique survival of the Anglo-Saxon earldom, it stood for that phase of English feudalism that most nearly approached the French dukedom. Until Henry VIII., exasperated at its loyalty to the Catholic cause, curtailed some of the feudal incidents of the Bishop,[1]—which, however, were later on mostly restored,—that dignitary was practically sovereign in his bishopric. *Quicquid Rex habet extra Episcopus habet intra* ran the maxim of Palatinate law.[2] At the head of the landed interest, the grantee from the king and the grantor to the county landowners, the Bishop exercised the feudal privileges of escheat, forfeiture, and wardship, and had the possession of mines, wastes, forests and chases. In civil and in military affairs he was supreme. The courts did not give the king's justice and did not punish breaches of the king's peace, but awarded the Bishop's justice and held to account violators of the Bishop's peace. Cases between his subjects were to be decided in the Bishop's courts. Cases between the Bishop and his subject could be appealed to the Court of the Exchequer, in London.[3] The Bishop had, also, admiralty jurisdiction of his coasts and navigable rivers, had his own money and his own mint, and had the authority to grant charters to cities.

When the king had business with the county, or with part of it, he must communicate with the Bishop. Still the royal authority was fully asserted over this dignitary.[4] In consequence of its extreme independence the county was not, until

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[1] Surtees: Hist. of Durham, Vol. I., Part I., p. lxix.

[2] *Ibid.*, Vol. I., Part I., p. xvi.

[3] In the 17th century a case between the Bishop and the City of Durham was decided in the King's Court of the Exchequer. Surtees: Hist. of Durham, Vol. IV., Part II., p. 159.

[4] *Ibid.*, Vol. I., Part I., p. cxxxiii.

1675, represented in the House of Commons. The Bishop, as a spiritual peer, sat in the House of Lords, and no doubt watched over the interests of the county in a general way.[1] Parliament fixed the amount of revenue that was expected from Durham. The Bishop and his officers determined how this was to be raised, and proceeded to collect it.[2]

The territorial division was primarily into four wards[3] and the city of Durham. The wards contained parishes and chapelries. A parish was divided into constabularies, and these in turn into manors, villages, etc.

The judicial system was of two ranks: the county courts, and the more strictly local tribunal. Of the former class were the regular English county courts of Law and Equity and of Gaol Delivery. The Justices for these were appointed by the Bishop, and had the numerous duties of the English Justices of the Peace of that time.[4] The courts of the second rank were the Halmote courts. These were the courts of the baronial hall, the "hall moots." Their business was to settle matters of customary tenure,[5] to make by-laws and injunctions, and to inflict penalties on guilty persons. They were held by the Steward, Bursar, or Terrar—or by any two of these—and always, as the records have it, "with others."[6] It was these "others" that gave the Halmote court its popular feature. It made it the tribunal of the tenants of the estate, who composed the vill, and its judgment represented their

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[1] During the time of Cromwell, the Palatinate jurisdiction was suspended and the county was reorganized simply as a part of the realm. It was, therefore, allowed to send representatives to Parliament. These sat in two of Cromwell's Parliaments. The Restoration wiped this away. Cf. Surtees: Hist. of Durham, Vol. I., Part I., pp. cvi. and cxlvii.

[2] *Ibid.*, Vol. I., Part I., pp. cxlviii. and 'ix. The king's officers collected customs in the county.

[3] The ward was only an arrangement for grouping the parishes, and had no civil functions.

[4] Woodrow Wilson: The State, p. 413.

[5] "Durham Halmote Court Rolls" (Surtees Society, Vol. 82), Preface, pp. xiv.-xxxiii.

[6] *Ibid.*, p. xi. Later on these courts were held by the Seneschal. Hist. of Durham, Vol. I., Part I., p. cv.

opinion. Its mandates ran: "Injunctum est omnibus tenentibus villae," or "ordinatum est ex communi assensu."[1]

The executive functions of the Palatinate government were in the hands of officers deriving their authority either directly or indirectly from the Bishop. Highest of all lay officers was the Chancellor of Temporalties. The ecclesiastical head, occupied—as was supposed—with religious affairs, entrusted secular business to his chancellor. That officer was the administrative head of the government. His it was to wield the Bishop's authority, albeit he was only an agent of his episcopal chief. Beside the high function of directing administration, he had what was then always considered the highest judicial jurisdiction; that is to say, he presided over the court of Chancery. It was by virtue of this function that he was at times spoken of as Vice-Chancellor.

The officer next in importance was the High Sheriff. He was appointed by the central authority, and at first had, doubtless, the large powers of the Norman sheriff; but by the seventeenth century his power had been lessened by depriving him of the duties of actively commanding the county militia, and of actually collecting the revenue.[2] At no time in the history of the Palatinate did he render his accounts in the Court of the Exchequer in London. He was responsible to the Bishop alone.

There was also a Receiver-General, whose functions were the receiving and the disbursing of funds. He received the rents from the praepositi, or bailiffs, and the other dues from the constables.[3] The greater part of the Bishop's revenue

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[1] Durham Halmote Court Rolls, p. xxiv.

[2] These two duties had been given to the Lord Lieutenant and the Receiver-General. The former was first appointed in 1536, just after the Catholic uprisings, but the Sheriff continued to have nominal command.

[3] In Hatfield's Survey of Durham (Surtees Soc., Vol. 32) there is an account in full of the Receiver-General for 1384. One extract taken at random from this will show the exact fiscal relation: "Et de 77*l.* 16*s.* 9*d.* de exitibus et proficuis villae de Easington currentibus in onere prepositi ibid., cum 50*s.* de perquisitis halmotorum ibid. Et de 54*s.* 4*d.* de aliis exit. et prof. ejusdem villae cum dominio non current. in onere prepositi, set constabularii." See p. 264.

came from rents for land. He also received, until 1660, a considerable sum from fines, forfeitures and other feudal incidents. Connected with the latter source of revenue was the Escheator, whose mere existence testifies how important was the feudal right of escheat.

The minor local officers were the coroner, the seneschal, and the bailiff. The seneschal was practically the old steward on the manor. We find him appointed to care for the towns, towers, castles or manors of the Bishop. The bailiff was the local agent of the Bishop. He looked after his master's interests in general, collected local rents or certain feudal privileges, and was charged with reporting to the regular sessions of the county courts the violations of Palatinate law within his bailiwick.[1]

In the County Palatine, as elsewhere in England, actual legislation came into existence slowly. The ancient customs of the people, evidenced by judicial decisions, were for a long time the chief source of law. This was especially true of Durham. Here the extraordinary privileges of the Palatine tended to retard law-making. There was no machinery for assembling the people to make their own laws. Whatever new measures of government the Bishop desired to introduce he had passed by his Council. This was an assemblage of the chief men of the county, and was, possibly, a formal survival of that council which, in Anglo-Saxon times, met with the Ealdorman to devise administrative measures for the county.[2] It was composed, as the records say, of certain enumerated higher officers and "other nobles"; presumably any nobles who chose to be present.[3] Public opinion was made manifest at the county courts. If the people demanded any measure, their desire found expression in the report of the grand jury, which brought the matter officially before the "sessions" of the Justices. The wise old Bishops were usually too much afraid of losing their influence over the

[1] Hatfield's Survey, p. xiii. [2] W. Wilson: The State, p. 410.
[3] Hatfield's Survey (Surtees Soc., Vol. 32), p. xviii.

people to withstand rashly demands for reasonable reforms.[1] When the Bishop had decided to make a new law he published it through the courts.[2]

Of parish government in Durham county but little need be said. The parish existed by virtue of English custom, and was in Durham but little different from the same institution elsewhere in the realm.[3] We note, however, that here it seems more decidedly an ecclesiastical institution. By the seventeenth century the vestry had already become "select," and in some instances the vicar had the right to assent to elections.[4] At the middle of this century, the time that most concerns us, the civil functions of the parish were caring for the poor, maintaining the highways, assessing the parish rate, and a few other minor local duties. At times we find the churchwardens called before the assize to answer for the execution of certain laws that had been made by Parliament.[5] Here, as elsewhere in England, there were constables to the parishes. They collected the local tax and executed the decisions of the local courts.

We can now summarize the features of the Palatinate Franchise. The county was a constituent part of the government of England, subject in a general way to the larger gov-

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[1] Hist. of Durham, Vol. I., Part I., p. cxlviii.

[2] The following will suffice to illustrate this: "It is orderit by the Justices of Peas wythin the bysshopprick of Duresme, by commandement of my Lord of Duresme in eschewyng of more bryne which gretly hurtyth the holl contre, as hereafter followythe, Fyrst, that no maner person ne person bryne ne more fro the 16th of March unto the fyrst day of October, accordyng to the lawe and custome of this realme of long time used."—Hatfield's Survey (Surtees Soc., Vol. 32), p. xiii. The memorandum goes on to say that if any one is suspected of burning a moor contrary to this ordinance, the township in which he resides must bring him before one of the Justices of the Peace, who shall condemn the culprit, if convicted, to imprisonment at the pleasure of the Bishop.

[3] For an account of the historical development of the English parish, see J. Toulmin Smith: The Parish; also Howard: Local Constitutional History of U. S.

[4] "Parish Books of Durham" (Surtees Soc., Vol. 84), pp. 2, 12, 26, 27.

[5] *Ibid.*, pp. 39, 67.

ernment, and in the actual administration of affairs it had a distinct machinery of its own. Within the county there were two forces: the Bishop and the people. The former was the chief source of authority. His rule was central and personal. He was the proprietary of the government. It was his agents that filled the offices. His exercise of power was restrained by public opinion, which was the only way of showing the popular will His ordinarily beneficent rule and the possibility of changing a bad Bishop soon, if one were in office, brought about a quiet and substantial government. Upon the whole the system was benignly paternal, and when in use by a conservative population was capable of yielding, as a system, a considerable amount of success.

### Section III.—*The County Palatine in America.*

The Palatinate Franchise having proved to be a good form of government in England, and withal safe against a very strong development of popular liberty, the king and the Lords Proprietors considered it the best system for a colony planted so far away from royal oversight as America. Moreover, of all conceivable constitutions, it was most in accord with the king's idea of what the constitution of England should be. Charles II., in common with all the other Stuarts, would have made the realm one grand property whereof the king should have been Lord Proprietor.

Almost the first step of the Proprietors of Carolina showed that they, too, were in favor of the Palatinate system. They set about devising a scheme of government that contained all the characteristic features of the English County Palatine. This was the widely known Fundamental Constitutions.

These constitutions, although there is evidence that they were acceded to by the people of North Carolina,[1] were not as a whole put into force. Those features that it was thought possible to enforce with the conditions then existing in the

[1] Col. Recs., III., p. 452.

colony were embodied in a temporary constitution, and that became the basis of the constitutional growth of the province. Speaking generally, all those provisions that related to the privileged classes and their position in society were held in abeyance; but there was no change in the spirit of the government. It was still strongly central and personal.

Examining the temporary constitution systematically, we are first attracted by the fact that the chief officer of the government bore the title of Palatine. This was undoubtedly in direct imitation of the County Palatine. Furthermore, the Governor of the colony was at times called "Vice-Palatine." The Proprietary was supreme. It had the veto power in legislation, and at first claimed the right of initiative. It appointed the chief officers, and its chief officers appointed the minor officers. There was also a High Sheriff, with lessened powers, similar to those of the sheriff of the county of Durham. There is the same Receiver-General of quit-rents, and the same local collectors, though not called bailiffs; the same system of land grants and quit-rents; and the same Escheator. To enable feudal land tenure to be perfect, as it was in Durham in its palmiest days,[1] the statute of *Quia emptores* was relented. There was, also, the same system of courts. (1) The General Court corresponded to the county court of the Palatinate, and was held by appointees of the Proprietors. It had the same jurisdiction and sat as Oyer and Terminer, Gaol Delivery, King's Bench, Common Pleas, and the Exchequer. (2) The local courts were the Precinct courts, which corresponded to the Durham Halmote courts, being held entirely under the control of the Proprietors and having the same local jurisdiction over the same tenants of the proprietors of the government. In addition, the Vice-Palatine, by a deputation of the high authority of the Palatine, exercised chancery jurisdiction in the colony, just as the Bishop's deputy exercised it in Durham.

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[1] The Proprietors had the right to their privileges, it will be remembered, "in as ample manner as any Bishop" of Durham. (Col. Recs., I., 103; also *supra*, p. 20.)

Still, there was a difference between the Palatinate in Durham and in North Carolina. In the former place, customs and traditional rights made it irregular in some of its details; it presented a broken surface. In America no custom or tradition was to prevent its uniform operation. The Lords thought that they had simply to devise a system and put it into the way to work of its own accord. In Durham, custom had preserved to the popular element of government some local functions; in North Carolina these did not appear. The proprietary scheme ruled them out. The royal grant had guaranteed to the people an assembly; but even this had been largely nullified by the Proprietors, who at first constituted their legislature so that for some time they remained chief wielders of its law-making power.

The parish did not come into North Carolina till the colony was fairly settled, and during the proprietary period it was not uniformly and fully established.[1] In those few parishes in which there were efforts to keep up the establishment, the civil functions were caring for the poor and assessing the local rate. Through an abundance of food in the colony, the former was not important, and the latter, being usually confined to expenditure for religious purposes, was but poorly paid by the Dissenters, and so it became but little more than a voluntary offering by the members of the Established Church. The other important function of the civil parish, the care of highways, was, long before the introduction of the parish, confided to officers appointed by the precinct court, and there it remained.

The "open vestry" was never known in Proprietary North Carolina. The affairs of the parish were in the hands of a "select vestry," which was created in the first instance by the Assembly, and was replenished by co-optation.

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[1] Col. Recs., III., pp. 48, 152, 153.

## CHAPTER III.

### The Proprietors and the Constitution.

#### Section 1.—*The Legal Status of the Lords Proprietors.*

The powers conferred by the royal grant[1] on the eight "true and absolute Lords and Proprietors"[2] of Carolina may be classified as (1) legislative, (2) executive,[3] and (3) relating to land.

Taking up these in order, we find that in regard to legislation the Proprietors were given the right to make laws "by and with the advice, assent and approbation of the freemen of the said province." By this clause the Lords considered that they had the right of veto and initiative in legislation.[4] By another clause they must "from time to time assemble in such manner and form as to them shall seem best" the freemen or the delegates of the same. The Proprietors interpreted this as giving them the entire control of elections and of districts of representation, as well as of the time and place of meeting, and of the adjourning and the

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[1] We have used for reference the grant of 1665, which does not materially differ from the first grant, that of 1663. Being the last, it was the one under which the Proprietors may be considered to have held. See Col. Recs., I., pp. 102-114.

[2] They were: Earl of Clarendon, Chancellor of England; Duke of Albemarle, Master of Horse; Earl of Craven; John, Lord Berkeley, King's Councillor; Lord Ashley, Chancellor of the Exchequer and later the Earl of Shaftesbury; Sir George Carteret, King's Councillor; Sir John Colleton; and Sir William Berkeley, then Governor of Virginia.

[3] At this time the modern classification of government functions into executive, judicial, and legislative had not come into existence. This distinction dates from Montesquieu. Before him, the right of administering justice was considered a part of the king's executive function. For obvious reasons, we have followed the older method of classification.

[4] Lord Baltimore had these rights by the royal grant, but by wisely using the one and graciously foregoing the other he avoided any conflict with the settlers. See McMahon: Hist. of Maryland, I., p. 145.

proroguing of the Assembly. In the intervals between the meetings of the Assembly the Lords could make ordinances dealing with all ordinary matters, but not in any way impairing the rights of "freeholds, goods, or chattels." The power of making both laws and ordinances was limited by the requirement that all laws should be consonant to reason and as near as possible to the laws of England.

The executive powers were all that were necessary for the efficient management of internal affairs. Only in that they had not the actual sovereignty did the Proprietors lack full royal powers; and yet their authority was, for the purposes of their government, as ample as that of royalty. The charter, after conferring the general palatinate jurisdiction, went on to grant specifically the most important privileges embraced in that system. These were the civil functions of creating and filling offices; of incorporating towns, ports of entry, cities, etc.; of granting titles of honor, provided they were not the same as those used in England; of holding courts of justice and of punishing to the extent of life and limb; of pardoning offenses; of erecting counties and other local divisions; of creating baronies, with courts baron and leet, and with views of frank-pledge; of collecting customs duties when laid with the consent of the Assembly; and of having the advowsons of churches. They also had the military functions of making war against the Indians and other internal enemies, on land and on sea;[1] of raising and maintaining troops; of appointing officers for the militia; of fortifying their possessions; and of declaring martial law when they thought it necessary.

These extensive powers were rather vaguely limited by reminding the Proprietors that their privileges did not contravene their sovereign duties to the crown. There was, however, another limitation, which, though not expressly mentioned, was still a strong instrument in the hands of the

[1]The right of making war on foreign enemies was withheld, because that would have implied sovereignty in the Proprietors, and it might have involved England in war.

people against too arbitrary a use of power by the Lords. This was the right on the part of the Assembly of consenting to money bills. It was but little advantage to the Proprietors that they could levy troops if the Assembly alone could pay them. This fact was of great influence in keeping the government weak, and, consequently, so timid that it soon lost the respect of the people. But in the case of the higher officers this restriction was almost neutralized by the fact that these officers received nearly all of their salaries from moneys taken in for quit-rents or from sales of lands. They were, consequently, not directly dependent on the will of the Assembly. Only in the case of fees, which were fixed by the Assembly, were they even indirectly dependent on the legislature.

In regard to land, the Lords were tenants-in-chief, holding "in free and common socage," but still "true and absolute" proprietors, "saving always their faith, allegiance and sovereign dominion due to us, our heirs and successors for the same"; *i. e.*, for the land. Besides one-fourth of all gold and silver ore that should be discovered, they were to pay "a yearly rent of twenty marks," receivable at the king's manor of East Greenwich in Kent. The land thus held could be granted to others in fee simple, fee tail, for life, lives, or years; to be held by such customs, rents, or services as the Proprietors chose to agree to. That the lesser grantee might know that his rights were safe, he was accorded the right of holding lands on the above-named terms. As a further security, the statute of *Quia emptores* (18 Edw. I.), by which subinfeudation had been forbidden in England, was made inoperative in North Carolina.

So far we have spoken of the Proprietors only; and it is with them that the grant was chiefly concerned. There was only slight mention of the rights of the people. There was enough, however, to guarantee to them the common rights of Englishmen; that is to say, the right of consenting to laws; of exporting and importing commodities on the same footing with Englishmen; and of not being tried for crime in

another colony than Carolina;[1] together with the English personal and property rights; liberty of conscience, although provision was made for church establishment; and the privileges of liege subjects of the English Crown. In order to encourage the planting of the colony, it was declared that certain specified articles, which it was thought were especially adapted to Carolina's soil and climate, should for seven years be admitted to England free of duty.

The grant conferred essentially the same privileges that Charles I. accorded to the Proprietor of Maryland. It may, therefore, seem strange that while in Maryland the proprietary rule was well received, being twice abolished and as many times reinstated to the great satisfaction of the people,[2] in North Carolina it produced strong opposition and real misery, its abrogation being hailed by the people with delight. The cause lies in the personal qualities of the two proprietaries. Lord Baltimore used his extraordinary powers wisely, justly, and honestly. He realized for the County Palatine, as applied to colonization, whatever advantages inhere in it as a system. In North Carolina the Proprietors, being eight in number, lacked unity of organization. They were, also, not informed as to the conditions of life in the colony, and they made such unhappy selections of agents that their government became a burden to the governed and a pest to the governors. These facts operated to make the proprietary system a failure in Carolina. The experience of these two colonies—Maryland and North Carolina—leads us to conclude that the chief fault of the absolute proprietary colony was that it made the destiny of the people too much dependent on the will of the Proprietary. Still, any fair mind must agree that the system admitted of excellent results in proper hands.

While on this point, we must say something of the circumstances under which the grant was made. One occasionally

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[1] They were still allowed an appeal to the king.

[2] McMahon: Hist. of Md., I., 141-2.

encounters the idea that the government must have been especially odious because it was given to eight of the "favorites" of Charles II. Now, there is a certain uncomplimentary sense in which this term is at times used, but there is no just reason for employing it here. If by "favorites" one means those whom the king called to help him in the affairs of state, there can be no objection to using the expression; for, of the eight, five occupied high offices at home, and one more was Governor of the most powerful English colony in America. It is fair to suppose that, as statesmen went in those days, the Proprietors were among the best. At a time when all England went wild with devotion to the restored Stuarts, nearly all of these eight men had the distinction of being among that small number whose loyalty was not an outgrowth of expediency, or of opposition to the arbitrary rule of Cromwell. They had, for the most part, been loyalists before the war, and many of them had lost property by their loyalty.[1]

That the good-natured king should have desired to reimburse these losses was more than natural—it was honorable. That he should have paid the obligation out of his American lands—that species of wealth of which he had the most—was unexceptionable. If, to our minds, it is an unwarrantable stretch of prerogative for the king to assume to provide, of himself, for the government of English citizens in America, it ought to be remembered that it was strictly within the custom of the time.

Whatever may have been the Crown's legal right in the first instance, there was in 1665 ample precedent for the king's power to dispose of the government of the Carolina colony. Judged by the standard of the times—something we should always remember in weighing historical actions—there was nothing improper about the transaction.

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[1] Clarendon, Colleton, Carteret, and John Berkeley had suffered with Charles II. Albemarle, formerly General Monk, had helped to reinstate him, and Wm. Berkeley had as Governor of Virginia kept the inhabitants of that province loyally affected to the Stuarts (Nar. and Crit. Hist., V., 286, note 2).

## Section II.—*The Proprietors' Theory of Government—The Fundamental Constitutions.*

Having, as we hope, set the Proprietors in a just light, let us see how they acquitted themselves as governors. The most characteristic feature of the period is the confusion which grew out of the uncertain nature of the constitution. For the first fifty years of the life of the colony the inhabitants could not be sure that their government was stable. The Concessions of 1665 established one form of government, which, so far as the inhabitants were informed, was to be permanent. In 1670 the Fundamental Constitutions arrived. With them came a temporary constitution. The former was received by the Assembly,[1] and the latter was actually put into force. The existing system was reorganized in 1691. After 1670 the Lords sent three editions of the Constitutions to Carolina. These changes must have failed to give to the people that idea of permanency which is so necessary to any constitution. In 1680 Shaftesbury himself declared that there had never been any regularly organized government in the colony. Unquestionably the Proprietors were failures as rulers. It was only in 1715, when the Constitutions became as a system forever impossible, and when the Lords relaxed their right to prescribe government and allowed the people to frame their own code of laws, that anything like regularity and security from change came into the government of North Carolina.

From what has just been said it may be inferred that there were till 1715 two constitutions for the colony, the one theoretical and the other practical. We must now analyse these. The latter we reserve for another place, and the former we shall consider as regards both its elements and its relation to the constitution actually put into force. This is the more demanded because this system has rarely received just the

[1] Col. Recs., III., 452.

treatment it deserves. It has been viewed, it seems to us, too much from the standpoint of nineteenth century democracy.

The conditions out of which the Fundamental Constitutions arose were peculiar. The moment during which they were conceived was a breathing-time just after two unsuccessful experiments with opposite radical ideas of government. English statesmen were pondering over their experiences, first under an absolute monarchy, and then under a government that grew out of a movement for an absolute democracy. The world has now come to think that Cromwell, with perhaps the best intentions, made as great a mistake as the Stuarts made. It also knows that the military despotism, by which the Protector found it necessary to support his authority, was not a necessary accompaniment of popular liberty. Englishmen of the time of which we are speaking understood the former fact but slightly and the latter not at all. To them each extreme seemed equally to be avoided. Accordingly, thoughtful people concluded that it was safest to trust the government to the middle class, the landed nobility. From this time, and in accordance with this idea, there arose the Whig party, which in a bloodless revolution overthrew the party of the royal prerogative, and established the principles of English liberty in the important Bill of Rights. It was through its influence, either in office or out, that the kingdom was brought to a condition in which self-government was possible.

It is a worthy tribute to Shaftesbury, who, whatever his later course, was at this time considered a well-intentioned man, that he foresaw, when Whiggery was a reality in the minds of but few, by what means the future was to be made safe. He, now that Clarendon had gone into voluntary exile on the Continent, was the most influential of the eight Proprietors. When an ideally perfect system of government was to be devised for the colony, he brought forward his views. Although Locke, the Philosopher, wrote the Constitutions, Shaftesbury inspired them. But the spirit in them

was an outgrowth of the time. The time was an unfortunate moment, when men had in their fright relapsed into the ideas of the fourteenth century.

Locke's share of the work, however, must not be ignored. He supplied the details for a plan whose general requirements were furnished him. The young philosopher was doubtless under the influence of recent experiences, and it was then a score of years before he, among the forces of the "Glorious Revolution," published his great works "On Civil Government" and "On Toleration." Still the spirit that produced "The Leviathan" was not all lost on the young Locke. Throughout the Constitutions we see the principle of civil liberty continually asserting itself. Wherever the feudal outline, the required part, ceases, liberal ideas appear.

In accordance with the idea of a landed aristocracy, the Fundamental Constitutions[1] divided society into seven ranks. At the top were the Proprietors, who were always to be eight in number, and each of whom should have a seigniory, or twelve thousand acres of land, in each county. This gave the Proprietors one-fifth of the land in each county. One Proprietor, the Palatine, was at the head of the whole government. All the other Proprietors were associated with him so as to form the Palatine's court, the chief court of the province. All executive functions were grouped into seven classes, or offices, and a Proprietor was placed in each office. Thus there was a Chancellor, a Treasurer, a Steward, etc. Each of these officers, with six associates, formed a court with supreme jurisdiction of the function or functions for which that officer stood. All these courts were integrated into a Grand Council, over which the Palatine presided, and which had an *ad interim* ordinance-making power and the right of initiative in legislation.

There were two ranks of hereditary nobility, landgraves

[1] We have used in this sketch the edition of 1669. It is the first authorized edition and is most easily accessible. See Col. Recs., I., 187-206. The Constitutions as amended in 1698 can be found in the Appendix to Vol. II. of the same series.

and caciques. There must be one of the former with four baronies[1] and two of the latter with two baronies each in every county. One man could have but one dignity. In case of failure of the heirs of one of these dignitaries, the Palatine's Court, or that failing, the Parliament was to fill the vacancy. The lord of each seigniory or barony had the right to hold courts leet. He could, also, grant two-thirds of his land to tenants for not more than three lives or twenty-one years; but the remaining one-third must be reserved for demesne.

Thus we see that the Proprietors and the hereditary nobility had two-fifths of the land of each county. The remainder was to be held by the freemen, in small holdings. It was divided into four precincts, each of which contained six colonies. It was held directly of the Proprietors, the holders paying annual quit-rents for it. If a man had from three to twelve thousand acres the Palatine's Court might erect his estate into a manor. The lord of a manor had the same privileges on his manor that a landgrave had on his baronies, but was not considered one of the hereditary nobility. To render this system permanent, primogeniture was recognized, and it was declared that these four kinds of estates should be indivisible, and, with the exception of manors, inalienable.

Below the four ranks already mentioned were the freemen. These were the smaller landowners. They made up the majority of the people, and, as a matter of fact, were the only persons mentioned in the Constitutions, except slaves, that settled in North Carolina. They were allowed to vote for delegates to the Parliament, and if they had a certain amount of land could hold most of the minor offices.

Proprietors, landgraves, caciques, and freemen—the last through their delegates—all met in a biennial Parliament. All ranks sat together in one body, but when a Proprietor protested against a proposed measure, the body resolved it-

[1] 12,000 acres of land was a barony, a colony, or a seigniory.

self into four estates and repaired to different rooms to vote on the question at issue. If one chamber voted in the negative the bill was lost. All laws to be voted on must have been prepared in the Grand Council and when approved in the Parliament must be endorsed by the Palatine and three Proprietors, or they were not binding.

Below the freemen were the leetmen. These were tenants of the seigniories, baronies, or manors, and had certain legal rights against, as well as certain legal duties towards, their lord. On the marriage of a leetman or a leetwoman the lord was bound to give the newly married pair ten acres of land, for which not more than one-eighth of the yearly produce could be taken as rent. A leetman was under the legal jurisdiction of the lord's court, without appeal to a higher tribunal. Moreover, he was *adscriptus glebae;* that is to say, he could not change his habitation without his lord's written permission. Whoever voluntarily became a leetman was a leetman; and the rank once acquired was, like every other rank of the Constitutions, hereditary.[1]

The seventh and lowest rank was slavery. A master was given absolute authority over his negro slave, but he was not allowed to bind their souls; for, contrary to a later practice of a part of the slave-owners in North Carolina,[2] a slave was allowed the privilege of becoming a church member.

The provisions thus far recounted may be considered the necessary features of a landed-aristocratic government. Beyond these there were no very objectionable points. An adequate system of local courts was provided for the freemen. Trial by jury was guaranteed, but a verdict need not be unanimous. The English system of town government by

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[1] Bad as this institution was, it is doubtful if it was worse than the custom, then extensively practised in England, of kidnapping children and peasants for bonded servants in the American colonies. See Doyle: English Colonies in America, pp. 382-5.

[2] As late as 1709, James Adams, the missionary, testifies that some slave-owners would not allow their slaves to be baptized because they thought they would have no right to enslave Christians. Col. Recs., I., p. 720.

council, aldermen, and mayor was introduced. Jurymen, voters, and officeholders must have a specified amount of land. Two ideas seem to have been taken from the Romans: (1) like Justinian, the Proprietors declared that there should be no commentaries on their body of law;[1] and (2) by making it a base thing to plead for money, they seem to have desired to introduce the custom by which the Roman nobles pleaded the causes of their *clientes*.

The most strikingly liberal feature was the attitude towards religious belief. The Constitutions provided for perfect toleration of all churches. To give a church legal standing it must have at least seven members. These must believe in a God who was to be publicly worshiped, and must declare their method of testifying in a court of justice. It must be confessed that even in the present time of sects it would be difficult to call any body of people a church that could not come up to these requirements. The liberalness of this will be seen when it is remembered that it was devised at a time when the English Parliament was rushing into the passing of the iniquitous Test, Conventicle, and Five Mile Acts.

Another notably liberal feature was the provision for a biennial Parliament. In England the king and the dominant party were devising schemes by which they could rule without a Parliament; but the Proprietors guaranteed the Carolinians that they should have the right to elect, and to assemble, their Parlianment every two years, whether or not an election were ordered or the Parliament formally summoned. If this arrangement were better than that of England, it far excelled that then in practice in the adjoining colony of Virginia, where the Assembly was not dissolved for eighteen years.[2] Moreover, there were no "pocket boroughs" in the colony, representation being fairly apportioned among the freemen.

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[1] Hadley: Introduction to Roman Law, p. 19.

[2] Bancroft: Hist. of the U. S., Vol. I., p. 50 (Ed. 1876).

To sum up, the Fundamental Constitutions were based on principles of like nature with those of the Whig party. They were feudal in their tendency, but guaranteed what were then considered the most important personal rights. Their reactionary features were hardly worse than their generation, and their liberal features were much better than the time. They were a system that the English people might well have had for themselves. Indeed, their appearance was hailed with marked approbation. On all sides people said that Locke's model was an ideal one. France and Germany at any time in the seventeenth or eighteenth centuries might well have considered them a boon. Almost any Continental nation of that day might advantageously have adopted them. It was not till the manifestation of that reform spirit which the American Revolution transmitted to the Old World that the constitutions of most European governments showed any striking improvement on the principles of the Fundamental Constitutions.

But if they would have done for the Old World they would not do for the New. The distinguishing principle of governmental policy developed in the period of our early history was a return to nature; not, as Rousseau thought, as nature was in some ill-defined, prehistoric time; but as nature then existed in the simple feelings and common sense of the people. The conditions of pioneer life made the existence of such an idea inevitable. In North Carolina it was universal, and where it held sway the system of Shaftesbury and Locke could never come into use.

Of this the Proprietors were half conscious. They sent along with the Fundamental Constitutions a temporary form which was partly an adaptation of the larger system. It did what the Governor was instructed to do; *i. e.*, it observed "what can at present be put into practice of our" Constitutions.[1] The original instrument was "received" by the people[2] in North Carolina and was afterwards pleaded as

[1] Col. Recs., I., 181.

[2] *Ibid.*, III., 452.

the evidence of a compact between the people and the Proprietors. It never replaced the temporary form, but continued for some time a kind of constitution in remainder, awaiting the time when it might come into its rights. This time never came.[1] A more popular system took by prescription, and held by force, the authority of the government and its right was recognized in the Revisal of 1715.[2]

The effect of the Constitutions[3] was, speaking generally, negative. They prevented the development of a better form

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[1] It is likely that the Constitutions continued their anomalous existence till 1715. We have no evidence that before this date they were repealed, but they were gradually falling out of the minds of the Proprietors several years earlier. This is shown by the fact that they are continually mentioned in the commissions to the Governors till in Gov. Tynte's commission, 1708, all reference to them is omitted (Col. Recs., I., 695). They are last mentioned in a Governor's commission, so far as we know, in 1702 (*Ib.*, I., 555), when Johnson is told to come "as near as possible to the Fundamental Constitutions." In 1706, the South Carolinians, addressing the House of Lords, claimed the benefit of that clause in the Constitutions which provided for liberty of conscience (*Ib.*, I., 638-9).

[2] The Constitutions were first brought into Carolina in 1670 by Sayle (Hawks: Hist. of N. C., II., 463). It is difficult to say who was then Governor. At a meeting on Jan 20, 1670, the Palatine appointed Samuel Stephens (Col. Recs., I., 180); but in the instructions that accompany the Constitutions there is a blank land grant dated "—— Jan., 1670," and in this, Peter Carteret is spoken of as Governor (*Ib.*, I., 183). These instructions were issued at the meeting at which Stephens was appointed, or at most not more than eleven days later. They could not have been issued earlier than the 20th, for on that day Berkeley was made Palatine and he is spoken of in the blank grant as such. The only reasonable conjecture that does not countenance an error in the instructions, is to suppose that Stephens was appointed but not yet sworn in, and that the old Governor, who seems to have been Carteret, was considered as still the incumbent. There are certain objections to this solution, as it will leave us under the necessity of believing that Stephens and Carteret each held the office for two distinct terms (cf. *Ib.*, I., p. xvi.).

[3] A recent writer goes so far as to say, "The Proprietors organized under the new system and sent directions to Governor Stephens to put it in force among the settlers on the Chowan" (Lodge: Eng. Colonies in America, p. 137). By the side of this let us place the real instructions. They run: "Not being able at present to put it fully into practice by reason of the want of landgraves and caciques and a sufficient number of people; however, intending to come as nigh as we can in the present state of affairs in all the colonies of our said province, you are required," etc. (Col. Recs., I., 181).

of government. Speaking more specifically, we may note two effects: (1) They precluded the introduction of local self-government, a fact which North Carolina had reason to regret during her whole colonial period; and (2) they produced confusion in the minds of the people and indirectly led to disregard for governors and government.[1]

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[1] There were five editions of the Constitutions: (1) the original draft, signed July 21, 1669; (2) that of March 1, 1670, a slight revisal; (3) that of January 12, 1682; (4) one issued at some unknown date between 1682 and 1698; and (5) that of 1698 (Hawks, II., 183-4, and Ramsay: Hist. of S. C., II., 123, *note*). The last was very much altered and contained but forty-one articles (see Col. Recs., II., appendix). In the minds of the North Carolinians there seem to have been but two sets, that of 1669 and that of 1698, both of which appear to have been received in North Carolina (Col. Recs., III., 452-3). The Lords themselves declared that the copy of 1682, the only one signed by all the Proprietors, was the only authentic edition (*Ib.*, I., 368). The Constitutions were translated into French in 1682, perhaps for the use of the French settlers, or for advertising purposes (*Ib.*, I., 344).

## CHAPTER IV.

### The Analysis of the Constitution.

The remainder of our task will be to trace the constitution as it actually was. This, in contradistinction to what we have just called the theoretical side of the Proprietors' government, may be termed the practical side. We shall take up its parts in the order of their dignity, beginning with the highest.

#### Section 1.—*The Lords Proprietors.*

Prior to 1669 the Lords seem as a body to have had no executive organization. In October of that year[1] they met and organized under the new Constitutions. The six Lords then attending were elected to fill the positions of Palatine, High Constable, Chancellor, Chief Justice, Admiral, and High Steward.[2] There is no evidence that either of these offices, except that of the Palatine, ever meant more than a new title to the name of him that filled the office. Yet there was a show of keeping them up; and so closely were they clung to that in 1691, when the government was reorganized, they were included in the new plan.[3]

The Palatine, however, was an active factor in government, and was continued with unimpaired powers till the Proprietary period ceased. He, with the other Proprietors, constituted the Palatine's Court, the only one of the Proprietors' courts that was organized. His individual power was small; but his signature, three of his associates consenting, could effect almost anything. At one time he seems to have had

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[1] Col. Recs., I., 179.

[2] On account of the absence of Clarendon and Sir Wm. Berkeley from England, two offices were not filled. These were the positions of Treasurer and Chamberlain.

[3] *Ibid.*, I., 373.

the right to name the Governor.[1] It was necessary for the Palatine to be the oldest Proprietor, and this was regardless of great age or inferior capacity. By this means the Proprietors bound themselves almost surely to forego a choice of the best man, and made it extremely likely that the reins of government should always be in the hands of the veriest dotard of their number.[2]

## Section II.—*The Governor.*

The determining of the policy of the government was in the hands of the Proprietors; but since they could not be on the spot themselves, each one appointed his agent or Deputy to represent him. As the Palatine was supreme among his associates, so his Deputy was supreme among the Deputies. This Deputy was the Governor, sometimes called the Deputy Palatine[3] and at others the Vice-Palatine.[4] The Fundamental Constitutions did not specifically recognize the office of Governor, the Palatine being there considered the head of affairs. The Governor was distinctively a feature of the makeshift constitution, and he was expected to give place to the Palatine in that day when the province should be perfectly organized under the scheme of Locke.

The Governor had for colonial purposes the general powers of the Palatine. He could exercise but few functions except with the consent of at least three of the Deputies. His chief power was his influence as titular head of the government and representative of the Proprietary authority. He was not fitted to have a conflict with the people or with any

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[1] See below, p. 47.

[2] The Constitutions provided that the eldest Proprietor in Carolina should be Palatine. Consequently when a Lord came into the colony, he could without a commission assume the duties of Vice-Palatine or Governor. This was recognized by the Lords in 1681, in the case of Sothel. They seem to have receded from this position in 1691 when they declared: "No Proprietor single by virtue of our patent hath any right to the government or to exercise any jurisdiction there unless empowered by the rest" (Col. Recs., I., 339 and 367).

[3] *Ibid.*, I., 180, 200.

[4] *Ibid.*, I., 345.

important branch of the administration, because when men ceased to be impressed by his dignity he was all but powerless. In such a case he was fortunate if he could prevent his enemies from securing his removal. If the Council should be opposed to him he could do but little. Through his conciliatory efforts, or through a unity of interests with the Proprietors, the Governor usually managed to steer clear of hostility from his brother Deputies, but he was not always so fortunate in reference to the representatives of the people.

The most important function left to the Governor independent of his Council was the right to concur in all measures, either of the Council or of the Assembly. Thus he was equal in power to each of these bodies. He also called, and presided over, the meetings of the Council. He was commander-in-chief of the colonial militia, and of his own authority appointed the subordinate officers. In 1697, when England determined to establish admiralty courts in the proprietary colonies, the Governor of North Carolina was made Vice-Admiral,[1] and from that time his official title was "Governor, Commander-in-Chief, and Vice-Admiral." He also, in the presence of the Council, administered to the higher officers of government[2] the oaths of fidelity and allegiance to the king and the Proprietors. He issued writs for the election of delegates, when directed to do so by the Proprietors or by the Council.[3] He had the execution of general orders, as enforcing the Navigation Act; received at times the probate of wills and granted letters of administration;[4] conducted business between the government and other colonies, calling on the Council at times for advice; and had the care of such minor matters as taking a census, measuring the water on the bars, and making a map of the country. At first, and for some time, he was directed to have

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[1] Col. Recs., I., 473.

[2] Col. Recs., I., 181.

[3] In the latter part of the Proprietors' rule the Assembly met of right biennially, and the writs were issued then at the decision of the Council.

[4] Laws of 1715, ch. 48.

passed in the Assembly certain laws that pleased the Proprietors.[1] For about forty years he sat as President of the General Court,[2] and had chancery jurisdiction. Convicted persons could be reprieved by him pending an appeal to the Proprietors.

The Governor was appointed by the Proprietors until 1691,[3] when he was supplanted by a Deputy Governor appointed by the Governor of Carolina, who, it was agreed, should be appointed by the Palatine.[4] The Deputy Governor could be removed by the Governor of Carolina either at the will of the latter or by the directions of the Proprietors.[5] The oldest Proprietor in North Carolina might take the office of Governor, being thought to have the right to supersede any Deputy. Such a Governor did not have to be approved by the king, as was necessary with any other kind of a Governor,[6] but still could be removed by the Proprietors.

At first no bond was required of the Governor, but when great complaint was made to the Crown in regard to illegal trade in North Carolina it was decided, in 1697, that the Deputy Governor should give bond for enforcing the Navigation acts. At first it was expected that the Lords themselves should give bond for their officer, but they protested that they ought not to be expected to do this, for the decision[7] "placed the approbation of their Governors in His

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[1] Col. Recs., I., 231.

[2] See below, p. 66.

[3] The instructions of 1665 gave larger powers to the Governor than were granted in and after 1670. In addition to the privileges just named, he could appoint his own Council, nominate the Secretary or Surveyor-General in case the Lords failed to select them, and preside in person, or by deputy, over the Assembly, which was then unicameral (Col. Recs., I., 79–92).

[4] Philip Ludwell, the first Governor of Carolina, was thus appointed (*Ib.*, I., 373). We have not seen the commission of Smith, his successor, but Archdale, who came next (1694), was appointed by all the Proprietors (*Ib.*, I., 389), and, so far as the records testify, so were his successors.

[5] The Governor of Carolina might be removed by the Palatine and three of the Proprietors, or by six of the Proprietors without the consent of the Palatine (*Ib.*, I., 374).

[6] *Ibid.*, I., 510.

[7] This decision was an Act of Parliament, whose direct jurisdiction extended in the colonies to matters of trade (*Ib.*, I., 476, 477).

Majesty." In the matter of trade, Parliament and the Crown were jealous of the powers of the Proprietors, and interfered to secure the proper collection of the customs. The king did not hesitate to instruct the Governor, through the Proprietors, by what means he was to execute these laws.[1] Edward Hyde, the first Governor of North Carolina after 1691, is the first whom we know to have given bond. The amount of the bond in other colonies was two thousand pounds, but because North Carolina's trade was inconsiderable, one thousand was thought sufficient for Hyde.[2]

Except in the case of Drummond, the first Governor, the tenure of office was during the pleasure of the Proprietors.[3] The salary was at first rather uncertain. Governor Drummond, the Proprietors suggested, might be paid with a monopoly of the fur trade, but there is no evidence that Berkeley put this idea into practice.[4] In 1669 the Assembly enacted that thirty pounds of tobacco should be paid by him who "was cast" in each suit before the Governor and Council. This was not a salary for the Governor, but simply the fees which the Governor and Council collected as officers of the court.[5] As early as 1686 the Governor of the southern colony was, we know, receiving two hundred pounds a year,[6] and it is therefore not likely that the Governor of Albemarle was

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[1] Col. Recs., I., 492, 496. [2] *Ibid.*, I., 773.

[3] Dr. Hawks (Vol. II., pp. 142-3) says the Governor was to "rule three years and then learn to obey." This is hardly correct. Berkeley was instructed to appoint a Governor for three years (Col. Recs., I., 52), and appointed Drummond, doubtless for three years. Yeamans, who was appointed Governor of Clarendon in 1665, was to hold "during pleasure" (*Ib.*, I., 95, 97). Samuel Stephens, Drummond's successor, appointed in 1667, held in the same manner (*Ib.*, I., 162), and so did all the other Governors whose commissions we have. Dr. Hawks's error was doubtless due to certain advertisements of the Clarendon colony, published in 1663 and in 1666, in which such a statement as he quotes was actually made (*Ib.*, I., pp. 43, 154, 157). This scheme to sell land could have no constitutional importance, for the Governor of Clarendon was in 1666 holding under a "during pleasure" commission. One cannot fail to notice also the bad policy in making a Governor rule first and then "learn to obey." In ordinary systems it is wise to make him "learn to obey" before he rules.

[4] Col. Recs., I., 52. [5] *Ibid.*, I., 185. [6] *Ibid.*, I., 391.

without any salary.[1] We arrive at definite information in 1711, when Edward Hyde's salary was two hundred pounds a year. Governor Eden's was three hundred pounds.[2] This seems to have been voted to each new incumbent for his term of office by the Council.[3] It was paid in quarterly payments out of the funds arising from the sale of lands and from the quit-rents.

If the office became vacant through the death or absence of the Governor, the oldest member called the Council together to elect a President of the Council, who administered the government until superseded by a Governor regularly appointed by the Proprietors.[4] The President received the salary that it was customary to pay to the Governor.[5] While the colony was under the direction of a Deputy Governor, Harvey, the incumbent, died. Henderson Walker, as President of the Council, succeeded him, and for five years guided the affairs of the province so much to the liking of the people that in 1706 the popular party induced the Proprietors to consent to having the government again under a President.[6] So much confusion arose from the attempt to enforce this concession that the Lords thought it advisable to return to the original method.[7]

When a newly appointed Governor arrived he presented his commission to the assembled Council, who published and recorded it. He then took the oaths of office and occupied his seat as presiding officer of the Council.[8] In the eyes of the Proprietors, considerable dignity was attached to this seat. Sir Peter Colleton, writing to the Governor in 1683, reminds him of his power in the Council and the Assembly, and says: "You ought to keep good order in the debates of

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[1] Edward Randolph said that in 1691 the Deputy Governor of North Carolina had no salary; but as Randolph mentions him as "one Jarvis," a name unknown in the records of the time, some doubt is thrown on the entire statement (Col. Recs., I., 467).

[2] *Ibid.*, II., 170.

[3] *Ibid.*, II., 450, 460.

[4] *Ibid.*, I., 790, and II., 460.

[5] *Ibid.*, II., 460.

[6] *Ibid.*, I., 709.

[7] *Ibid.*, I., 750.

[8] *Ibid.*, I., 841.

the Council when any one speaks he ought to do it with his hatt off and with the respect due to the place who are there a representative of the Palatine and by consequence the king from whence the Palatine's power is originally derived and it was in Culpepper's case, who made a disturbance in Albemarle in Carolina for which he was indicted of high treason at the King's Bench Barr declared to be treason for any man to take up arms against our government, it being levying warr against our king."[1] It must be confessed, however, that if Sir Peter's knowledge of Proprietary law was as limited as his knowledge of the art of writing clear English, his opinion is of but little value.

## Section III.—*The Council.*

In regard to membership, the history of the Council in Proprietary North Carolina divides itself into four periods. In the first there were six, eight, ten or twelve members who were selected by the Governor. This period ended with the temporary constitution of 1670, when the Council was made to consist of the five Deputies, who represented the colonial nobility, and five additional members elected by the Assembly. The latter represented the people. The third period began in 1691, when the Council was composed entirely of the Deputies. Finally, a last change was made in 1724,[2] when the Deputies were abolished and the membership was fixed at twelve, or less, all of whom were appointed by the Proprietors.

If the powers of the Governor independent of the Council were small, those of the Council independent of the Governor were still smaller. Its right to disagree with a proposition of the Governor seems to have been rarely exercised. As among the Proprietors there was a strong reluctance to merge the wishes of the individual Lords into the will of the

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[1] Col. Recs., I., 845.

[2] *Ibid.*, II., 515. The Lords decided to introduce this feature in 1718 (*Ibid.*, II., 299).

Palatine, so there was among the Deputies a disposition for each to act, not for the colony, but for the interest of his chief.

The powers of the Governor and Council when acting together were, however, considerable. They varied with the changes in the constitution. During the first period, when the colony was small and the Assembly met annually, many matters could be carried to the legislature which would otherwise have gone before the Council. In the recess of the Assembly the Council[1] had most of the executive powers. It appointed the officers of all courts erected by the Assembly, and could suspend temporarily an officer appointed by the Proprietors. It could punish all officers, civil, religious or military, who violated their trusts. It issued and revoked commissions to military officers, granted reprieve, subject to the final action of the Lords, issued warrants for land grants, saw that settlers had the common personal and property rights of Englishmen, and did anything else that was not affixed to some other organ of government.[2]

In the second period the Council underwent a peculiar change. Two institutions now performed the functions of the older Council. These were the Council and the Deputy Palatine's Court. The membership of the former we have already stated; the latter was composed of the Governor and the five Deputies.[3] Both bodies were provided for in the Fundamental Constitutions, although they were now changed as to make-up.

The Council, or Grand Council, as it was at times called, was intended to be a semi-popular institution. It was a makeshift for the Grand Council of the Constitutions, and was endowed with all the powers of its model. It could decide disputes as to jurisdiction and procedure in the lower courts; declare war against the Indians, and make treaties of

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[1] After this when we use the term "Council" we mean, unless otherwise designated, the Governor and Council.

[2] See for this period, Col. Recs., I., 79–92.

[3] So far as we know there were no Deputies till 1670.

peace, alliance and commerce with the same; levy military forces; prepare all bills that were to come before the Assembly; decide matters relating to the Proprietors or to the Deputies; expend money voted for specific purposes by Parliament; and register the appointed Deputies.[1] On it was conferred as a temporary matter the authority to establish such courts as the Council "for the present time think fit for the administration of justice, till our Grand Model of Government can come to be put into execution."[2] To this was added the function of warrants for issuing land grants. Finally, the Governor was instructed to "governe" with the Council—whatever that term may have been held to mean.

One who reads casually the instructions to the Governors of this time will be apt to imagine that the Deputies acted only as a part of the Council. Such is not the case. They were authorized to represent the Palatine's Court of the Constitutions, and were thus empowered to convene the Assembly, to pardon offenses, to elect to offices in the Palatine's disposal, to erect ports of entry, to expend funds, except those granted by the Assembly for specific purposes, to negative acts of the Grand Council and of the Assembly, and to have all powers not otherwise granted which under the royal grant belonged to the Proprietors.[3] By the temporary arrangement they were given the power to consent to legislation.[4] Later on they had acquired the right to decide certain questions relating to land grants, as well as to adjourn, prorogue, or dissolve the Assembly.[5]

The latter of these two bodies was by nature the stronger. Apart from the fact that it represented the Proprietary interest, it actually controlled the Council; for, it will be remembered, the Deputies and the Governor constituted a majority in that body. That the stronger should have usurped the properties of the other, and the weaker should have become atrophied, is but natural. Accordingly, we find

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[1] Col. Recs., I., 196-7. [2] *Ibid.*, I., 182. [3] *Ibid.*, I., 193.
[4] *Ibid.*, I., 182. [5] *Ibid.*, I., 239.

that in 1691 the Proprietors realized that the function of proposing laws was all that was left to the Council, and, since the people petitioned against the exercise of this function, they abolished the Grand Council altogether,[1] and reorganized their Deputies into what we have called the Council of the third period.[2]

By the beginning of the third period the usurpation of the Deputies became complete. What had been before a temporary Palatine's Court was now called a Council. In North Carolina, which was left to be reorganized as the Governor of Carolina saw fit, there seems to have been little change in the machinery of government. The change in the title of the Council came gradually. As late as December 9, 1696, the Council that met Archdale at the house of Francis Jones was called the Palatine's Court.[3] Owing to a dismal lack of documents on this period we do not know just when the change was completed. Judging from the powers held when we do get definite information, one would say that all the functions which were possessed by the two older bodies were given to the one new institution, except, of course, the preparing of laws.

In the fourth period there is no constitutional change except as to membership. In the latter half of the preceding, and in all of this, period the records of the Council are well preserved. From these we are struck with the large amount of judicial business done by the Council. It had much to do with lapsing the grants of, and issuing new patents for, land; and occasionally it probated wills. By this it will be seen that it was a regular court of record.[4]

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[1] Col. Recs., I., 381.

[2] It is improbable that either Council or temporary Palatine's Court exercised all the powers implied in constructing them like the two features of the Constitutions. The impossibility of introducing this instrument would prevent this: besides, the Proprietors, being supreme over both institutions, did not hesitate to take to themselves such business as they could handle better.

[3] Col. Recs., I., 472.

[4] For treatment of the Council as a court, see below, p. 71.

The most considerable of all its rights was the appointing of all those officers not named by the Proprietors. The effect of this was to place for a time the disposition of every higher office, except the delegates to the Assembly, in the hands of the central power.[1] The Council appointed the associate justices of the General Court, Justices of the Peace in the Precincts, the Sheriff, or Provost Marshal. In addition it could fill temporarily any vacancy that was, of right, in the hands of the Lords.

The Council sat as the Upper House of the Assembly. In this capacity its authority extended to any act of the Lower House, except to the passing of the budget, which seems to have been beyond their interference.[2] Now, as at other times, it was presided over by the Governor, who, however, had no vote in making a majority. All the members, including the Governor, received a salary equal to that of the members of the Lower House. For the time it was the Upper House; it had a Secretary—who was the regular Secretary of the Province and of the Council—a Doorkeeper, and a Messenger.[3] These officers were chosen by the Upper House, and corresponded to the officers of the other house. Each set, taken severally, received the same salary. When sitting as a Council merely it had a Messenger, who received an annual salary of twenty pounds.[4]

In 1722, on receiving directions from the Palatine, the Chief Justice of the colony was allowed by virtue of his office to sit as a Councillor, his rank being next to that of the head of the government.[5] In 1727 the Surveyor-General of His Majesty's Customs in America was also declared entitled to sit in the Council of any colony in which he might be.[6]

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[1] Registrars of precinct courts were conditionally elective by the people.

[2] This assertion is based on the minutes of the Assembly. Here, while various other acts are sent to the Upper House for concurrence, no reference is made to such an action in regard to the money bill (Col. Recs., II., 675).

[3] Col. Recs., II., 623.

[4] *Ibid.*, II., 607. [5] *Ibid.*, II., 460. [6] *Ibid.*, II., 673.

The power of removing a Councillor was always in the hands of the Lords. If a Deputy should die or leave the province, the Governor and Council could appoint another to hold till the Proprietors named some one else. A Councillor thus appointed could perform all the duties of Deputies, except to vote for a man to fill a similar vacancy. One could do this only when confirmed under the seal of the said Lord.[1] Until 1718 the Councillors met at their own expense. In that year they agreed that for the future the necessary expenses of the meeting should be defrayed from the funds in the hands of the Receiver-General.[2]

### Section iv.—*The Assembly.*

The General Assembly is the title by which the legislative body of North Carolina was usually known,[3] although at times we find the expression "Grand Assembly." It first convened in 1665,[4] but under what system we cannot say. We do know that the instructions sent to Sir William Berkeley, who was authorized to settle the government of Albemarle, empowered "the Governor and freemen, or the major part of them, the deputies or delegates, to make good and wholesome laws" for the colony. Later on instructions were sent directly to Drummond,[5] but they are not preserved. Under which of these the first Assembly met we do not know.

We come to firm ground with the Concessions of 1665.[6] It is from this point that our definite knowledge of the history of the Assembly begins. The Assembly, it was declared, should be unicameral, and composed of the Governor, the Council, and twelve delegates of the people. As soon as

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[1] Col. Recs., I., 375. [2] *Ibid.*, II., 323. [3] *Ibid.*, I., 81.

[4] See Weeks: "William Drummond," *National Mag.*, Apr., '92. If, as was likely, Drummond's instructions (Col. Recs., I., 93) were similar to the Concessions of 1665, the Assembly must have met in, or soon after, January of this year; for by the Concessions the election of delegates was held January 1st.

[5] *Ibid.*, I., 93. [6] *Ibid.*, I., 79.

the county could be divided into precincts, the inhabitants were to meet on the first day of each January to elect two[1] delegates from each precinct, a majority of these delegates being necessary to transact business. The Governor, or his Deputy, ought to preside, but if neither of these could be induced to be present the body could choose its own president.

Left as it was under Proprietary influence, the Lords seem to have thought it safe to confide to this body extensive powers. Accordingly, it had the right to appoint its own time of meeting; to adjourn from time to time, or from place to place; to make laws, provided they were not contrary to reason, to the interests of the Proprietors, or to anything otherwise stipulated in the Concessions, and provided they were as nearly as possible conformable to the laws of England; to establish courts of justice; to lay taxes on all property but the unsettled lands of the Proprietors; to erect baronies, manors, precincts, and other political divisions; to establish ports of entry; to provide military defense; to incorporate towns; to naturalize foreigners; on certain conditions to prescribe the quantity of land allotted and the manner of allotting it; to appoint such ministers of religion as should be provided for; and to determine its own quorum, provided it were not less than one-third of the whole. The laws when passed by the Assembly and signed by the Governor and three Deputies were published and, unless vetoed by the Proprietors, remained in force one and one-half years. If the Lords approved them they were in force till repealed, or till they expired by their own provisions.

The Concessions were copied and sent out in 1667 as Governor Stephens' instructions.[2] They remained in practice till 1670.

By the temporary constitution of 1670 Albemarle was divided into four precincts,—Chowan, Perquimans, Pasquo-

[1] The Concessions omit the word "two," evidently by oversight; but the instructions to Governor Stephens (1667), otherwise exactly the same, supply it (Col. Recs., I., 167).

[2] *Ibid.*, I., 167.

tank, and Currituck,—each of which had five delegates in the Assembly. The twenty representatives and the five Deputies—who now for the first time appear—made up the Assembly. As soon as they met they elected a Speaker, and that being done, they chose the five persons who, with the Deputies, made the Council.

In the presence of such an effective engine of the Proprietary influence as the Deputies, it is but natural that the Assembly should have lost some of its former powers for the benefit of the new institution. The spirit of the new form of government was predominantly proprietary. The immediate effect on the Assembly was to make it but little more than a tool of the Proprietors. Its chief function was now legislative. The Governor, "by and with the consent of the Assembly," made such laws as he saw fit. All laws must be signed by the Governor and three of the Deputies, after which they remained in force two years unless repealed by the Proprietors. If, however, they were confirmed by the Lords they remained good laws until repealed by the Assembly or until they expired by limitation.

The Fundamental Constitutions[1] provided that the Assembly should meet biennially, and gave it the right to convene without the call of the Governor. The temporary constitution, however, simply directed each Governor in turn to call an Assembly "as soon as conveniently you can after the receipt of these instructions." There is nothing further in the instructions, but we know that in the latter part of the century the Assemblies became almost regularly biennial, a circumstance which, though not evidenced by formal records, is well attested by numerous allusions in the correspondence of the time.

The changes of 1691 made actually apparent what had before been in the earlier stages of development; they completed the evolution of the Upper House. By the provision of the temporary constitutions of 1670 the Deputies and the

[1] Col. Recs., I., 199, 201, §§71–80.

representatives had composed the Assembly; from which, as it seems, the Governor was excluded. This left the consent of the Governor and three Deputies to all laws an affair entirely out of the Assembly. From the custom of the Governor and Deputies meeting to consider the measures of the larger body grew the distinct organization of the Upper House. This growth was accompanied by the gradual dropping of Deputies from the Lower House, as we shall now venture to call it. This process was complete, and formally recognized by the Proprietors in 1691.

A few years later, in 1696, the region to the south of Albemarle was erected into Bath county and given two representatives in the Assembly.[1] Nine years later it was divided into three precincts, each of which was allowed two delegates.[2] In 1722 Bertie precinct in Albemarle was created and given two delegates. This made a membership of twenty-eight in the General Assembly, the highest point reached during the Proprietary period.

By the time of the Carey Rebellion, the Assembly had acquired considerable importance. It was no longer overshadowed by the Proprietary interests. Free from the restriction which came from giving the initiative in legislation to the Governor and Council,[3] it now began to develop in dignity and power, until it may be said to have been at length the chief factor in government. Through this process the Lower House gained the ascendancy, becoming practically the entire Assembly.[4]

This increased authority is shown by the part the Lower House took in the troubles arising from the Carey Rebellion. In 1708 Glover and Carey, the rival claimants to the governorship, agreed to refer their claims to this body for arbitrament;[5] and in 1711, when it was necessary that some part of the government should be found strong enough to settle the

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[1] Col. Recs., I., 472. [2] *Ibid.*, I., 629. [3] *Ibid.*, I., 881.

[4] From the Carey Rebellion to the close of the Proprietary period the Lower House seems to have had more power than it was allowed in the succeeding Royal period.

[5] Col. Recs., I., 697.

affairs of the colony, the Assembly came to the front as the regulating authority. Its exercise of power indicates its supremacy. It assumed to arrest Carey,[1] and dared to nullify all laws, judgments and other acts of government that had been made in the last two years, except marriages, probates of wills, letters of administration, sales and conveyances of lands when made between residents, provings of right to land, contracts and bargains.[2] Besides this, it attempted to regulate the future. It provided by act for the punishment of sedition, made regulations for qualifying officers, fixed the penalty for changing the oath of office, recognized the common law of England in North Carolina courts, adopted certain statutes of the British Parliament, settled the manner of filling vacancies in the places of Governor and of Lord's Deputy, and in the way of private bills provided for settling claims arising from alleged irregularities in Moseley's administration of the office of Surveyor-General. To this it added an address to the Lords, in which were stated calmly and intelligently the views of the Assembly on the existing condition of government. The people of North Carolina had spoken to the Proprietors before this, but usually to complain of grievances in the way of harsh laws or unscrupulous officers. Now they appeared in a constructive capacity. The Assembly passed from an almost continual opposition body to what we may call a body of friends to the administration. There was in this change a marked advantage to the colony. Aside from whatever sentiment we may have for Moseley and the "popular party," we cannot fail to notice that the triumph of Pollock and his friends brought with it the confidence of the Proprietors in the Assembly, and this, we know, led to many wise laws and withal to a long period of peace, prosperity and real constitutional growth. Neither Carey nor his followers could have brought about this result. The real interests of the colony both at home and abroad demanded a conservative policy. That is what the dominant party pursued.

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[1] Col. Recs., I., 780. [2] *Ibid.*, I., 784–794.

The social condition of the people favored an extension of the authority of the Assembly. The Proprietors, the Governor and the people all wanted peace. It was necessary to have a power strong enough to assure it. The Assembly alone seemed adequate. The Proprietors' government was just at that time terrified before the Indian hostilities. The Lords were only too glad to find in the colony a force strong enough to bring harmony out of the existing discord.

The confidence of the Proprietors soon manifested itself in an important way. It had for some time been a real evil that the laws, never having been printed, were become so confused that, except by long and inconvenient searching of the records, it was impossible to know just what was law. As a relief for this the inhabitants asked that the laws might be codified. The Lords consented, and soon after the arrival of Governor Eden the Assembly took up the task of making what is known as the Revisal of 1715.

When the student of the constitutional history of North Carolina comes to this point he feels like expressing his relief in a long-drawn breath. He is on solid ground at last. The confusion which a dubious system and meager records have hitherto brought to him now gives place to certainty. He now has the outline of the government clearly set forth in well preserved records. After 1715 there is no need to complain of lack of materials.

The Assembly of 1715, the first called by Governor Eden, was harmoniously constituted. The outcome of its work was fifty-seven laws, either revisals of former enactments or entirely new measures.[1] Act fifty-seven "repeals all former laws not herein particularly excepted."[2] The most important for us at present is the act relating to the election of members of the "biennial and other Assemblies."[3]

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[1] These laws are preserved in two excellent manuscripts in the State Library at Raleigh. Titles of the acts, with Burrington's comments, are given in Col. Recs., III., 180–189. The important acts of the code are given in full in *Ibid.*, II., pp. 206, 207, 213, 884, 885, 886, 888 and 889.

[2] *Ibid.*, III., 189.

[3] *Ibid.*, II., 213.

This act stipulated that the freemen of Albemarle county should elect five delegates from each precinct, and that those of Bath and other counties should have two for each precinct. They were to meet at certain specified places on the first Tuesday in November of alternate years and select their delegates from the freeholders. Foreigners, mulattoes, Indians, and minors were not allowed to vote, and one year's residence as a rate-payer was required of all others. The election was held by a marshal, or his deputy, who took the deposition of all whom he suspected of illegal voting. Each voter was required to bring his written ballot subscribed by himself. Returns of the election are not mentioned, but from a later source we learn that it was the custom to send them to the Governor and Council.[1] Each officer who had held an election was required to attend the Assembly during the first three days of the session, in order to be at hand to give evidence in contested election cases. The regular Assembly was biennial and met on the first Monday in November at the place of its last meeting—unless the Governor and Council twenty-one days beforehand designated another place. As regards calling, proroguing and dissolving the Assembly, the Lords and their agents were supreme.

If a representative-elect did not make his appearance by a time specified in the summons, he was fined twenty shillings for each day he was absent. The quorum of the Lower House, here called the House of Burgesses, was one-half of all the members elected; but if eight were met they had the right of adjourning from day to day until a quorum arrived. A bill, to become a law, must be signed by the Speaker in the presence of seven of his brother-members, as well as by the Governor and a majority of the Council. All special Assemblies were to be chosen as in the case of the regular Assemblies. This act, says Burrington in 1731, "was an old law taken from the Lords Proprietors' original constitutions, and hath undergone little alteration"[2] in the revisal.

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[1] Col. Recs., II., 575. [2] *Ibid.*, III., 180.

By this time a slight advance in its authority to repeal laws seems to have been made by the Assembly. In 1716 the Proprietors directed the Council and the Assembly to repeal a recent law by which North Carolina bills had been made payable for quit-rents.[1] Evidently the Lords had relinquished the right of repealing laws themselves, or considered it better policy to induce the Assembly to repeal them. The distinction was without a difference, however; for the Council gave the directions the force of law and instructed the Receiver-General to take only English money.

So far as the Assembly was concerned the administrations of Eden, Pollock, Reed, and Burrington (first term) were quiet enough; but it was otherwise with that of Sir Richard Everard. From the beginning there was a contest between him and the legislature.

In 1725, the first year of his administration, Everard, fearing to encounter the popular party, prorogued the Assembly before it had met. The Lower House refused to recognize the validity of such a prorogation, and assembling on the day originally set, proceeded to organize the House.[2] All they could do brought no recognition from the Governor, whose action they stigmatized as illegal. They declared that at their next meeting they would transact no business until their privileges had been confirmed by the Governor and Council, voted an address to the Proprietors, and then adjourned till the day for which they had already been prorogued. On reassembling, they declared that they did so according to adjournment, recognized the officers elected at the previous meeting, and in various other ways endeavored to establish the legality of their previous assembling.[3]

This Assembly (1726) is the first regular session of which we have the journal. It will be interesting to note here the formalities by which business was transacted. On the appointed day the members came together and received the election returns from the Provost-Marshal. Next, two

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[1] Col. Recs., II., 250. [2] *Ibid.*, II., 575. [3] *Ibid.*, II., 608.

members were sent to the Upper House to inform them that the Lower House was met and desired instructions for electing a Speaker.[1] In reply, the Upper House sent two members requiring the Lower House to attend to receive instructions. The inferior body then went *en masse* and were formally instructed to select their Speaker. They returned to their hall, elected their Speaker, informed the Upper House of the fact, and signified their readiness to present him. The superior body replied that they were ready to receive the person chosen, whereupon the Lower House attended the Upper House and formally presented their presiding officer. The Governor then addressed both Houses in a short and perfunctory speech, and the Speaker's official position was considered established.

On returning to their hall, the Upper House was informed that the Lower House was ready to receive the members of the Council who should be sent to witness the qualification of the representatives-elect. Accordingly, two Councillors were appointed for this duty.[2] The House itself, being thus legally convened, then swore in its own inferior officers,—the Clerk, the Doorkeeper, and the Messenger. It next resolved itself into a Committee of the Whole on Propositions and Grievances to prepare an answer to the Governor's speech. When ready, this answer was presented by the Speaker, who was accompanied by the whole House. In this session, when the Governor and Council decided to prorogue the Assembly, the Lower House was summoned and the Governor delivered the prorogation in person. The Lower House

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[1] It will be seen that the Lower House was in a dilemma. They had—and legally, as they claimed—elected Maurice Moore for Speaker. How could they now ask for instructions to elect a Speaker without acknowledging the illegality of that other election? Their solution of the problem was adroitly managed. Either advisedly or otherwise, Maurice Moore did not appear, and they immediately declared that his office was vacant, and then proceeded to elect another man for Speaker (Col. Recs., II., 608).

[2] Some of the Councillors, it was required, must witness the swearing-in of delegates, and if any delegate came late, other Councillors must be sent for before he could take the oath.

considered this illegal, and instructed the Speaker to pronounce the prorogation, which being done, they considered themselves legally adjourned.

From this Journal we gather some further particulars of the powers and constitution of the Lower House. It had the right to expel a member; to decide contested election cases involving membership in their body; to remit taxes; to send for persons, papers and records, with the object of redressing grievances; to appoint a Public Treasurer; and to pass money bills without the concurrence of the Upper House. Each member of each House received ten shillings for each day that attendance on the Assembly kept him from his home.

Each House had a Clerk,[1] whose duty was to keep the records and to issue warrants for commitment at the order of the House. His salary was, it seems, one pound a day.[2] For extra work he received extra pay. At this Assembly it was enacted that the Clerk should have two pounds for each warrant of commitment.

The Messenger's regular duties are not stated. He does not seem to have been the bearer of messages between the two Houses, for this duty was entrusted to members appointed for that purpose. We are told no more than that he executed the warrants of commitment, for doing which he received in each case one pound for each day during which he had the offender in custody. Besides these fees he had a regular salary, which was one-half as much as that of the Clerk, and which was just equal to that of the Doorkeeper.

We cannot close this sketch in a better manner than to relate an incident which very well illustrates the Assembly's

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[1] The Secretary of the province was regular Secretary of the Council and acted in the capacity of Clerk when the Council sat as the Upper House.

[2] At this Assembly he received twelve pounds as his regular salary. The delegates served for thirteen days, and it is probable that, inasmuch as the Clerk took office on the second day—being elected on the first—he served for twelve days. This would make his salary a pound a day. This, as well as other salaries, it must be remembered, was in colonial bills, which were then depreciated to one-fourth of their face value in English money.

jealousy of its privileges, its lack of the knowledge of its limitations, and its naïve candor in recognizing and correcting its mistakes. It seems that one John Richards had been imprisoned by the Provost-Marshal on the verbal order of Chief Justice Gale, although a *mittimus* was obtained the next day. The case being brought before the Lower House on petition from Richards, that body declared the commitment illegal and ordered the Provost-Marshal to relinquish the petitioner. Now, Richards, being no member of the House, this order was beyond the privileges of that body, as the members were made to see on the very next day. Instead of devising some ingenious bill which would cover its retreat from an untenable position, the House frankly acknowledged that it had no power to release from custody any one not its own member, repealed the previous order, and seemed to have thought its dignity none the worse for its mistake.

### Section v.—*The Judicial System.*

The judicial system embraced the General Court, the Precinct Courts, the Court of Chancery, the Admiralty Court, and, in a manner, the Council.

*The General Court.*—Until the arrival of the temporary constitution of 1670 the only tribunal in the colony, so far as we know, was held by the Governor and Council. This is indicated by a law signed by the Lords Proprietors, January 20, 1670, which granted the "Governor and Council in time of court" thirty pounds of tobacco for each action, to be paid by "him that is cast."[1] The Concessions of 1665 had granted to the Assembly the authority to create the courts that should be found necessary, but had left the appointment of judges and other officers to the Governor and Council.[2] In the sparsely settled territory of the infant colony one court seems to have been thought sufficient for all causes. It seems to have combined in itself the jurisdiction in law and in chancery as well as in criminal cases.

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[1] Col. Recs., I., 185.

[2] *Ibid.*, I., 82, 84.

The temporary constitution gave the power of establishing courts to the Governor and Council,[1] who, however, made no change in the court they had. The growth of the colony had necessitated the erection of Precincts, or districts of representation in the Assembly. It was consequently a part of the same process to make these Precincts the territorial bases of local courts. Here then was a differentiation. The older tribunal was now known as the General Court, and became the appellate court of the colony, the prototype of the present Supreme Court of the State.

This court was held by the Governor and the Deputies until near the end of the century. In 1685 the Proprietors concluded that it would be better to take the trial of causes out of the hands of these officers. Accordingly, the Governor was ordered to appoint four discreet men "to be Justices of the County Court of Albemarle." He was also to appoint a Sheriff,[2] who, with the justices, was to hold the General Court. The Governor and Council were to be a court to hear complaints against these new justices.[3] When in 1691 the Proprietors remodeled their form of government this new feature was incorporated into it[4] and continued there throughout the Proprietary period. Like many other orders of the Lords, this one was not put into execution until long after it was issued. As late as 1695 the General Court was held by the Governor and Deputies,[5] and it is only in 1702 that we know that the new system was in use.[6] The loss of court records between these two dates makes it impossible to say whether or not the change was earlier than the latter year. We only know that in this year Samuel Swann, William Glover, and John Hawkins, sitting by virtue of a *dedimus* from the President of the Council, held the General Court.[7]

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[1] Col. Recs., I., 182.

[2] This use of the term "Sheriff" recalls the time when the English Sheriff was a judicial officer; here it simply meant chief judge, and had no administrative significance.

[3] Col. Recs., I., 351. [4] *Ibid.*, I., 375. [5] *Ibid.*, I., 442.

[6] *Ibid.*, I., 566.

[7] In 1694 and 1695 the Governor and Deputies sat with one or two "assistants." These were perhaps men who were better acquainted with the law of the colony than the former officers, and were chosen to advise on technical points. We hear nothing of them in this capacity after this date (cf. Col. Recs., I., pp. 405, 442).

The next step, and the last for us, was taken in 1713, when one of the Justices was made a Chief Justice, with a commission directly from the Proprietors.[1] Christopher Gale, one of the most remarkable of North Carolinians, became in that year the Chief Justice, although his commission did not arrive until one and a half years later. He was, it seems, the first to hold the office.[2] The number of his associates varied. In 1713 it was two, in 1716 ten,[3] in 1724 two,[4] and after other changes it became about eight.[5]

The Associate Justices were equal in authority with the Chief Justice.[6] In 1716 it took two Associates to transact business in the presence of the head of the court,[7] and in 1718 it was ordered that no court could be held without this dignitary, and that when all were present a majority was to decide.[8] The court met three times a year.[9] In the early part of that century it was allowable for a Justice to come down from the bench in order to represent a client before the court,[10] but in the Revisal of 1715 there is a law which forbids this, in either the General or the Precinct Court.[11]

The authority of the General Court was derived from two commissions. Under one it had the power of the courts of King's Bench, Common Pleas, and Exchequer: under the other it was a General Session of the Peace, and a Court of Oyer and Terminer, and Gaol Delivery.[12] The members of

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[1] Col. Recs., II., 80.

[2] Hawks (II., 139) gives Moseley as the first Chief Justice, holding from 1707–1711, but mentions no authority for the statement.

[3] Col. Recs., II., 264. [4] *Ibid.*, II., 525, 551. [5] *Ibid.*, II., 572.

[6] When the Royal Governor, Burrington, was disputing with the Assembly on this point, that body claimed that the powers of the Assistants were not equal to those of the Chief Justice. They based their claim entirely on a clause in the king's letter of instructions. It is evident that if they had known of a custom to support their side they would have mentioned it. The failure to do so is an indication of the absence of the custom (Col. Recs., III., 169–175).

[7] *Ibid.*, II., 264.

[8] Although this change was made in 1718 it does not seem to have reached the colony until 1724. *Ibid.*, II., 299, 525, 551.

[9] *Ibid.*, II., 265. [10] *Ibid.*, I., 590, 592. [11] *Ibid.*, III., 181.

[12] *Ibid.*, III., 150. These commissions seem at times to have been pu into one, cf. *Ibid.*, II., 264.

the Council and other "principal officers" had general commissions of the peace.[1] This gave them the right to meet with the General Court when it sat by virtue of the latter commission; but the court records show that they very seldom availed themselves of this privilege.

From the General Court there was an appeal to the king. This, however, was of little consequence on account of a royal instruction of 1689, forbidding the Governors to allow appeals for cases involving a less sum than £500.[2] This, together with the inconvenience and expense of taking witnesses to England and the delay in the English courts, reduced appeal to a practical nullity. We have no record of an appeal during the Proprietary period.[3]

The General Court had certain non-judicial functions. It could regulate fares at ferries and appoint ferrymen,[4] direct the repairing of roads,[5] and by the direction of the Assembly it apportioned taxes and ordered the payment of the public indebtedness.[6]

The executive officer of the General Court was the Sheriff, or Provost-Marshal. These two terms are found side by side in the early history of the colony, but by the eighteenth century the latter is found exclusively as the official title, although "Sheriff" is still met in common use. The appointment to this office was made regularly by the Governor and Council. Both Albemarle and Bath counties had Provost-Marshals, although there was no General Court in the latter. In the closing years of their regime the Proprietors themselves appointed one Provost-Marshal for the whole colony.[7] This was of but little consequence, however, for Bath county, by an especial arrangement, was allowed to keep its distinct officer.[8]

Besides executing the orders of the General Court, the

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[1] Col. Recs., II., 526, 556. [2] *Ibid.*, II., p. 161.

[3] At one time the General Court decided that there was no right of appeal from its decisions to the king (Hawks, II., 207-9).

[4] Col. Recs., II., 475. [5] *Ibid.*, II., 470. [6] *Ibid.*, I., 429.

[7] *Ibid.*, II., 569. [8] *Ibid.*, II., 606.

Provost-Marshal summoned juries, which were drawn after the English fashion;[1] appointed his deputies, who did for the Precinct Courts what he himself did for the central tribunal,[2] and at the direction of the Council notified the members, through his deputies, when a call had been issued for the convening of an Assembly.[3] He also, through his deputies, held the election for the members of the Assembly,[4] and executed the commands of the Council when it sat as a court.

The General Court also had a Clerk. His duties were merely those of a scribe. He was appointed by the Chief Justice,[5] and his remuneration was derived from fees.

The earliest Attorney-General of whom we have information was George Durant, who held the office in 1679.[6] The office continued until 1729, although we have but slight mention of it before 1713.[7] It seems to have been controlled by the Governor and Council under their general authority to appoint court officers.

*The Precinct Court.*—This court was held by several justices of the peace,—there was no fixed number,—who were appointed by the Governor and Council.[8] One of the number was the Chairman, or, as he was at times called, the Judge.[9] They held frequent courts, Perquimans having in 1703 seven in each year.[10] There being no court-houses in the colony, the court met until after 1722 at the residence of some conveniently situated planter.[11]

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[1] Col. Recs., I., 412. [2] *Ibid.*, I., 791-2. [3] *Ibid.*, II., 460 and 516-7.
[4] *Ibid.*, II., 214, 215. [5] *Ibid.*, III., 201. [6] *Ibid.*, I., 313.
[7] In 1696 Edmund Randolph said that there was no Attorney-General in North Carolina, but he seems to have referred to an officer of the Admiralty Court, the one that was afterward called the Advocate. At any rate we know that there was an Attorney-General in North Carolina in 1694, cf. *Ibid.*, I., 438.
[8] Dr. Hawks (vol. II., p. 194, but see *Ib.*, 139) is inclined to think that in 1711 it was wholly inherent in the Governor to appoint the Justices of the Peace. But in 1703 the commissions for Perquimans Precinct were signed by the Governor and Council, and later on there is abundant evidence that this was the regular method (cf. Col. Recs., I., 574, and II., 526, 570).
[9] Col. Recs., I., 522, 531, and II., 725.
[10] *Ibid.*, I., 574, 575. [11] *Ibid.*, III., 191.

The Precinct Court had jurisdiction over all civil suits under fifty pounds, and fulfilled the function of the English Orphans Court. It also had some non-judicial business. Owing to the late introduction of the parish, it received many of the duties which in England were in the hands of the vestry, and which in New England were left to the Selectmen. It was the unit of local government in North Carolina. It cared for highways, creating road districts and appointing overseers for them,[1] appointed constables,[2] granted franchises for building mills, gave permission to build bridges, and authorized the opening of new roads.[3] With the Clerk was recorded, in open court usually, the marks by which the settlers distinguished their cattle and hogs.[4]

The officers of the Precinct Court were the Marshal and the Clerk. The former executed the orders of the court and was the deputy of the Provost-Marshal. The duties of the latter were merely clerical, and he seems to have been appointed by the Secretary of the Province.[5]

*The Court of Chancery.*—When the Proprietors took the General Court out of the hands of the Governor and Council they did not carry with it the chancery jurisdiction which they had formerly lodged there. This court continued to be held by the Governor and Council till the end of the Proprietary period.[6]

*The Admiralty Court.*—This court was instituted to enforce the acts relating to trade. It was an extension of the English Admiralty Court, whose powers it had in local matters. Previous to 1698 all affairs that would rightly have come under its cognizance were by an act of 15 Charles II. left to the common law courts.[7] In this year, however, North Carolina was attached to Virginia for this purpose and one tribunal was made to serve the two provinces.[8] This ar-

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[1] Col. Recs., I., 493. The General Court in a few instances are known to have appointed road overseers (cf. *Ib.*, II., 261).
[2] *Ibid.*, I., 486, 493. [3] *Ibid.*, I., 531, 533. [4] *Ibid.*, I., 388.
[5] *Ibid.*, I., 574. [6] *Ibid.*, III., 150, 197. *Ibid.*, I., 471-2.
[7] *Ibid.*, I., 490-1, 510.

rangement did not last long, and early in the succeeding century the colony had its own Admiralty Court.

The officers of this court were a Judge, a Register, a Marshal, and an Advocate. They were appointed by the Admiralty Court in England,[1] to whom they were obliged to report,[2] but vacancies were temporarily filled by the Governor and Council.[3]

*The Council as a Court.*—Besides being for a long time the General Court, and continuing to sit as the Court of Chancery, the Council had certain other judicial functions. Wills were proved before it,[4] and executors' accounts returned to it.[5] It could divide lands, and at times heard charges against citizens.[6] It tried officers for misconduct in office,[7] and we occasionally find it binding over to the General Court persons charged with ordinary offenses.[8]

## Section VI.—*Finances.*

There were three sets of fiscal officers in North Carolina; (1) The Collectors of the Customs, (2) the Receiver-General and his deputies, and (3) the Public Treasurer. The first collected the import duties for the king. He was appointed by the Surveyor-General of His Majesty's Revenues in the Southern District[9] of America. The second collected the quit-rents, and was appointed by the Proprietors. The third received the taxes levied by the Assembly and collected, as it seems, by the Precinct Marshals.[10] He was elected by the

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[1] Col. Recs., I., 632.
[2] *Ibid.*, II., 762.
[3] *Ibid.*, I., 491, and II., 520, 765.
[4] Laws of 1715, Ch. 48.
[5] Col. Recs., II., 493–4.
[6] *Ibid.*, I., 376, 855.
[7] Cf. the trial of Tobias Knight. *Ib.*, II., 341–349.
[8] *Ibid.*, II., 56, 59.
[9] *Ibid.*, I., 842–3.
[10] There is mention in the records of 1713 and 1714 of a Precinct Treasurer (*Ib.*, II.. 66, 124). This may have meant the Precinct Marshal or it may have indicated a distinct officer. There is not enough evidence, however, to warrant the statement that such an officer continued for any considerable time. While he did exist, he paid out moneys at the order of the Assembly and appeared in every sense a true treasurer. (See also *Ib.*, III., p. 151.)

Lower House of the Assembly and to that body was responsible. He was always looked upon as a most important bulwark of popular liberty. The office was doubtless of early origin, but it first comes into notice early in the eighteenth century.[1] All direct taxes of the colonial government were poll taxes, and were levied upon white adult males and colored adult males and females, bond and free.

### Section vii.—*Miscellaneous Officers.*

*The Register.*—This officer was in existence in the colony from the first. One of the laws of 1715 (ch. 38) provided that he should be appointed by the Governor from three freeholders who should previously have been selected by the voters in the precinct; and this was doubtless the method from the first.[2] Thus there was a popular element in the selection of Registers. The duties of the Register were registering deeds, which were often for personalty, and were usually acknowledged in the precinct courts, and, until the appointment of parish clerks, the recording of births, marriages, and deaths.

*Constables.*—These were appointed by the Precinct Courts. To each was assigned a district, there being several in each precinct. Besides the usual duties of constables, they made lists of the tithables for the use of the vestry,[3] and summoned the coroner's jury. The slight mention of the office in the records would seem to indicate its small importance.

*The Coroner.*—The Concessions of 1665 provided for this officer. Then he was appointed by the Governor and Council, and a law, which Burrington pronounces an old one, in the Revisal of 1715,[4] shows that this method was retained throughout the Proprietary period.

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[1] Col. Recs., III., 151.

[2] The Fundamental Constitutions provided that he should be appointed by the Chief Justice's Court from three men selected by the freeholders. As the Governor and Deputies held this court, it is likely that they took their idea from the Constitutions, and thus introduced the method which was embodied in the Revisal of 1715.

[3] *Ibid.*, I., 830.

[4] Laws of 1752, pp. 2, 3.

*The Secretary of the Colony.*—The Proprietors always appointed this officer, whose duties were chiefly clerical.

*The Naval Officer.*—This dignitary was appointed by the Governor at first[1] and later on by the Lords.[2] His duty was to "clear" vessels and to perform other similar functions at the ports. By 7 and 8 William III. he was required to give bond to the Collector of the Customs for the due performance of his duties.[3]

*Surveyors.*—Lands were laid out either by the Surveyor-General or his deputies, one of the latter being in each precinct. These were appointed primarily to survey public lands, at that time an important function. At first the Surveyor-General was appointed by the Proprietors,[4] and he appointed the Deputies,[5] but later on both were named by the Governor and Council.[6]

*The Escheator.*—The Proprietors' right to tenure involved the right of escheat. Property escheated, as in England, for failure of heirs, and for conviction of felony. When lands were thought to be escheatable the Escheator, or his deputy, called a jury, who took evidence to find if there were any heirs.[7] No heirs appearing in the colony, it was held that there were none in existence. The Escheator seems to have been appointed by the Governor and Council.

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[1] Col. Recs., I., 492, 7. [2] *Ibid.*, II., 497. [3] *Ibid.*, I., 497.
[4] *Ibid.*, I., 73, 211. [5] *Ibid.*, I., 728. [6] *Ibid.*, I., 872.
[7] *Ibid.*, II., 805.